IN THE MATTER OF : A

CAUVERY WATER DISPUTES TRIBUNAL

NOVEMBER 22, 1991

[RANGANATH MISRA, CJ., K.N.SINGH, A.M. AHMADI, KULDIP SINGH AND P.B. SAWANT, JJ.] B

Constitution of India, 1950:

Articles 131 and 262—Original Jurisdiction of Supreme Court—Inter-State river water dispute—Adjudication of—Excluded from purview of Court and vested in Water Tribunal under the Inter-State Water Disputes Act, 1956—Question of grant of interim relief—Whether could be agitated before Court. C

Article 143—Advisory Jurisdiction—Whether Court can review its opinion—Whether President can refer a question of law already decided by the Court—Advisory opinion on Presidential Reference—Nature and effect of. D

Articles 245,246,248,262, Seventh Schedule, List I—Entries 56 and 97, List II—Entries 14,17 and 18—Inter-State river water—Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991/Act No.27 of 1991—Constitutional validity of—Legislative competence of State Legislature—Whether denuded by Parliamentary legislation—Whether State Legislature can change the law declared by Court—Whether can set aside decision of inter-parties and affect their rights and liabilities alone—Whether Inter-State Disputes Act enacted under Article 262 or Entry 56—Distinction inter se between Article 262, Entry 56 of List I and Entry 17 of List II—Executive Order or legislative enactment of State Legislature interfering with adjudicatory process of Water Tribunal—Whether interference with judicial power of State. E F

Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991/ Act No.27 of 1991: Constitutional validity of. G

Inter-State Water Disputes Act, 1956:

Sections 5(2) and 6—Inter-State river water dispute—Order of Tribunal granting interim relief—Whether a report and decision—Whether requires to be published in the official gazette. H

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Section 11—Exclusion of jurisdiction of Courts, including Supreme Court—Question of grant of interim relief—Whether falls outside purview of the Section.

Practice and Procedure:

Supreme Court Rules—Order XL, Rule 1—Advisory opinion of Supreme Court under Article 143 of the Constitution—Whether could be reviewed.

In pursuance of the directions given by this Court in a Writ Petition filed by the Tamil Nadu Ryots' Association, the Union Government, by its notification dated June 2, 1990, constituted the Cauvery Water Disputes Tribunal under Section 4 of the Inter-State Water Disputes Act, 1956 for adjudication of the dispute regarding sharing of water of the inter-State river Cauvery between the States of Karnataka, the upper riparian State, Tamil Nadu, the lower riparian State, and Kerala and the Union Territory of Pondicherry. By another notification of the same date, it also referred the water dispute emerging from the Letter of Request lodged by the State of Tamil Nadu under Section 3 of the Inter State Water Disputes Act with the Central Government on the failure of the negotiations between the parties in this regard, for reference of the dispute to a Tribunal for adjudication.

In the Letter of Request the State had made a grievance against construction of works in Karnataka area and the appropriation of water upstream so as to prejudice the interests downstream in the State of Tamil Nadu, and also sought the implementation of the agreements of 1892 and 1924, which had been entered into when most of the areas in these States comprised in the then Presidency of Madras and the then State of Mysore. The last of the agreements had expired in 1974 and though the understanding of 1976 had been reached, further negotiations in the matter had failed and hence the State of Tamil Nadu had lodged the aforesaid Letter of Request.

Before the Tribunal, the State of Tamil Nadu submitted an application for interim relief praying that State of Karnataka be directed not to impound or utilise water of Cauvery river beyond the extent impounded or utilised by them as on 31.5.1972, as agreed to by the Chief Ministers of the basin States and the concerned Union Minister and an order restraining Karnataka from undertak-

ing any new projects, dams, reservoirs, canals and/or from proceeding further with the construction of those already commenced in the Cauvery basin. The Union Territory of Pondicherry also sought a direction both to Karnataka and Tamil Nadu to release the water already agreed to during the months of September to March. A

Meanwhile, Tamil Nadu filed an urgent petition to direct Karnataka, as an emergent measure, to release at least 20 TMC of water as the first instalment, pending final orders on their interim application. B

Besides contesting the application on merits, both Karnataka and Kerala raised a preliminary objection that the Tribunal constituted under the Act had a limited jurisdiction, and had no inherent powers as an ordinary Civil Court has, and there was no provision of law which authorised or conferred jurisdiction on the Tribunal to grant any interim relief. The Tribunal held that since the question of granting interim relief was not referred to it, the applications for interim relief were not maintainable. C D

On appeal by the State of Tamil Nadu and the Union Territory of Pondicherry, this Court held that reliefs prayed for in the applications for interim relief and directions, were covered in the reference and fell within the purview of the dispute referred to it by the Central Government under Section 5 of the Inter-State Water Disputes Act. Accordingly, the Court directed the Tribunal to decide the applications for interim relief and directions on merits. E

Rejecting the objections once again raised by the State of Karnataka, as regards the maintainability of the applications for interim relief, the Tribunal passed an order directing the State of Karnataka, to ensure that 205 TMC water was available in Tamil Nadu's Mettur reservoir every year. Tamil Nadu was also directed to deliver to Pondicherry 6 TMC water. The Tribunal also directed Karnataka not to increase its area under irrigation by the waters of Cauvery, beyond the existing area. The order was to remain operative till the final adjudication of the dispute referred to it. F G

The Tribunal's order thus gave rise to the issuance of the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 by the State of Karnataka nullifying the Tribunal's order. The ordinance was subsequently replaced by Act No. 27 of 1991. H

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A The State of Karnataka also instituted a suit under Article 131 against the State of Tamil Nadu and others for a declaration that the Tribunal's order granting interim relief was without jurisdiction and, therefore, null and void, etc.

Under these circumstances, the President of India made a Reference to this Court under Article 143(1) of the Constitution seeking advisory opinion on: (a) whether the Ordinance and the provisions thereof were in accordance with the provisions of the Constitution, (b) whether the Tribunal's order constituted a report and a decision within the meaning of Section 5(2) of the Inter-State Water Disputes Act, and whether the same was required to be published by the Government of India in order to make it effective, and (c) whether a Water Disputes Tribunal constituted under the Inter-State Water Disputes Act was competent to grant any relief to the parties to the dispute.

It was contended on behalf of the State of Karnataka that the legislation clearly fell within the competence of the State Legislature under Entry 17 as well as Entries 14 and 18 of List II in the Seventh Schedule of the Constitution and the State Legislature had every right to legislate on the subject and this legislative power was subject only to Entry 56 of List I which, however, did not denude the States of the power to legislate under Entry 17, and, in the absence of the constitution of a River Board for Cauvery, as envisaged under Entry 56, the State retained full legislative power to make laws as if Entry 17 had remained untouched; that the executive power of the Union under Article 73 could not extend to any State with respect to matters on which the State alone could legislate, in view of the field having been covered by Article 162 of the Constitution; that since the Inter-State River Disputes Act enacted under Article 262 of the Constitution did not attract any Entry in List I, it was law essentially meant to provide for the adjudication of a dispute with respect to the use, distribution or control of waters of, or in, any inter-State river or river valley and did not, therefore, step on the toe of Entry 17, that the Ordinance, which became Act subsequently, only sought to impose by section 3, a duty on the State Government to protect, preserve and maintain irrigation from Cauvery waters in the irrigable areas falling within the various projects specified in the Schedule to the said legislation, and, therefore, the legislation was clearly within the scope of the State's power to legislate and was *intra vires* the Constitution. A fortiori, the power to legislate conferred on the State Legislature by Entries 14, 17 and 18 of List

II, could not be inhibited by an interim order of the Tribunal, since the scheme of the Act envisaged only one final report or decision of the Tribunal under section 5(2) which would have to be gazetted under section 6 thereof, and therefore, it was open to the Karnataka Legislature to make a law ignoring or overriding the interim order of the Tribunal; that the scheme of the Act did not envisage the making of an interim order by the Tribunal; once a water dispute was referred to the Tribunal, it must 'investigate' the matters referred to it and forward a report to the Central Government setting out the facts found by it and giving its decision on the matters referred to it, and the Central Government must publish this decision in the official gazette to make it final and binding on the parties to the dispute, and since the interim order was not preceded by such an investigation, the said order could not be described as 'a decision' under section 5(2) of the Act, and consequently, the Central Government was under no obligation to publish the interim order, that the words 'any matter appearing to be connected with or relevant to water dispute' employed in section 5(1) of the Act did not contemplate reference of an interim relief matter, nor could the same empower the Tribunal to make an interim order pendente lite, and, therefore, having regard to the purpose, scope and intendment of the Act, the Tribunal constituted thereunder had no power or authority to grant any interim relief which would have the effect of adversely interfering with its existing rights, although while finally adjudicating the dispute it could override any executive or legislative action taken by the State, and since the allocation of flow of waters between the concerned States was generally based on the principle of 'equitable apportionment', it was incumbent on the Tribunal to investigate the facts and all relevant materials before deciding on the shares of the concerned States which was not possible at the interim stage and hence the legislature had advisedly not conferred any power on the Tribunal to make an interim order affecting the existing rights of the concerned parties, and that the President could refer any question of law under Article 143 and therefore, also ask the Supreme Court to reconsider any of its decisions.

In its written statement, the State of Kerala, by and large, supported the stand of the State of Kerala. However, subsequently it was submitted that since neither the scheme of the Act conferred any power on the Tribunal to make an interim order nor the scope of Article 262 read with the scheme of Act contemplated making of a Reference in that regard, the only remedy available to a State

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A which apprehended any action by the upper riparian State likely to adversely affect the rights of its people, was to move the Supreme Court under Article 131 of the Constitution, notwithstanding the provisions of Article 262 and section 11 of the Act; and accordingly, this Court's view that there was a Reference to the Tribunal for grant of interim relief was not consistent with the true meaning and B scope of Article 262 and the provisions of the Act and this Court should not feel bound by it.

The State of Tamil Nadu contended that ordinarily a dispute between two or more States would be governed by Article 131 of the Constitution and, subject to the provisions of the Constitution, the C Supreme Court alone would have jurisdiction if and in so far as the dispute involved any question whether of law or fact on which the existence or extent of a legal right depended, that the Tribunal was required to perform a purely judicial function which, but for Article 262 and section 11 of the Inter-State Water Disputes Act, would have been performed by a court of law, that since the Tribunal was D a substitute for the Supreme Court, it was reasonable to infer that all the powers exercised by the Supreme Court under Article 131 could be exercised by the Tribunal while adjudicating a water dispute and, therefore, the ancillary and incidental power to grant interim relief inhered in such a Tribunal without the need for an express provision or any specific reference to it in that behalf; that E apart, the decision of this Court dated 26th April, 1991 that the reference to the Tribunal included the question of grant of interim relief operated as *res judicata* and was binding on the contesting parties regardless of the view that this Court might take on the generality of the question referred for decision; if the question of granting of interim relief formed part of the Reference, the Tribu- F nal was duty bound to decide the same and even otherwise, it had inherent jurisdiction to grant interim relief, whether or not the question regarding grant of interim relief was specifically referred, and therefore, its decision would constitute a report under section 5(2) of the Act and was liable to be published in the official Gazette as required by section 6; that if there was any ambiguity in the G interim order the same could be taken care of under section 5(3) of the Act; that the Ordinance in question was *ultra vires* the Constitution for diverse reasons; the real object and purpose was to unilaterally nullify the Tribunal's interim order after having failed in the first round of litigation; the State of Karnataka had no right to unilaterally decide the quantum of water it would appropriate or H the extent to which it would diminish the flow of Cauvery waters to

the State of Tamil Nadu and thereby deny to the people of Tamil Nadu their rightful share in the Cauvery waters; the right to just and reasonable use of water being a matter for adjudication by the Tribunal, no single State could, by the use of its legislative power arrogate unto itself the judicial function of equitable apportionment and decide for itself the quantum of water it would use from the inter-State river regardless of the prejudice it would cause to the other State by its unilateral action; such a power could not be read in Entry 17 as it would be destructive of the principle that such water disputes were justiciable and must be left for adjudication by an independent and impartial special forum to which it was referred, namely, the Tribunal constituted for resolving the dispute, and not by unilateral executive or legislative interference, and, therefore, the object of the legislation not being *bona fide,* the same could not be allowed to stand as it had the effect of overruling a judicial order passed by a Tribunal specially appointed to adjudicate on the water dispute between the parties thereto; it sought to override or neutralize the law enacted by Parliament in exercise of power conferred by Article 262 (and not Article 246 read with the relevant entry in the Seventh Schedule) of the Constitution; a State Legislature could have no power to legislate with regard to a water dispute as it would be incongruous to confer or infer such power in a State Legislature to destroy what a judicial body has done under a Central law; it had extra-territorial operation, in that, it directly impinged on the rights of the people of Tamil Nadu to the use of Cauvery waters; it was also contrary to the Rule of Law, and a power not comprehended even by Article 262 could not be read into the legislative power of the State for it would pervert the basic concept of justice; and was also violative of the fundamental rights of the inhabitants of Tamil Nadu guaranteed by Articles 14 and 21 of the Constitution, in that, the action of Karnataka was wholly arbitrary and in total disregard of the right to life of those inhabitants in Tamil Nadu who survived on Cauvery waters; it was further contended that in a civilised society governed by the Rule of Law, a party to a 'lis' -water dispute- could not be allowed to arrogate to itself the right to decide on the dispute or to nullify an interim order made by a Tribunal in obedience to the decision of the apex court, by abusing the legislative power under Entry 17 under which the legislation purported to be; moreover, the jurisdiction of this Court under Article 143 of the Constitution was discretionary and this Court should refrain from answering a Reference which was in general terms without background facts and was likely to entail a roving inquiry which may ultimately prove academic only; secondly,

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A the State of Karnataka had immediately after the interim order instituted a suit in this Court in which it had prayed for a declaration that the interim order of the Tribunal dated 25th June, 1991 was without jurisdiction, null and void, and for setting aside the said order; while on the one hand, the decision of this Court had become final and was *res judicata* between the parties thereto, on B the other hand, the State of Karnataka was raking up the same question of jurisdiction before this Court in a substantive suit with a view to over-reaching this Court's earlier order; the Presidential Reference in terms referred to disputes and differences having arisen out of the Tribunal's interim order which was said to have given rise to a public controversy likely to result in undesirable conse- C quences; such matters could be effectively countered by the concerned Government and did not call for a Presidential Reference; if there was any doubt or difficulty in the implementation of the order in question, recourse could always be had to section 5(3) of the Act and hence, this Court should refuse to answer the Reference.

D The Union Territory of Pondicherry, contended that the promulgation of the Ordinance (now Act) was intended to further protract the long standing water dispute which came to be referred to the Tribunal only after this Court issued a mandamus in that behalf and was likely to prejudicially affect the interest of the State as well as the farmers and other inhabitants who utilised the water from E river Cauvery; that the said legislation was unconstitutional and was a piece of colourable legislation, that in the case of flowing water the riparian States had no ownership or proprietary right therein except in the usufruct thereof and, therefore, the power to legislate therein under Entry 17 of List II could extend to only the usufructuary right subject to the right of a riparian State to get the F customary quantity of water; that the Ordinance was also void for repugnancy, being in conflict with the Central legislation, and also violative of Article 21 of the Constitution as it was intended to diminish the supply of water to Tamil Nadu and Pondicherry, which was also against the spirit of Articles 38 and 39 of the Constitution, that since the water dispute referred to the Tribunal comprised the G issue regarding the grant of interim relief, as held by this Court, the interim order made by the Tribunal constituted a report within the meaning of section 5(2) of the Act and, consequently, the Central Government was obliged to publish it, as required by section 6 of the Act; and when so published it would operate as a decision *in rem*: but even without publication it was binding on Karnataka as a H decision *in personam*, since the jurisdiction of all courts including

the Supreme Court was taken away by virtue of section 11 of the Act read with Article 262(2) of the Constitution, and the Tribunal had all attributes of a Court; it was required to discharge the judicial function of adjudicating a water dispute between two or more States and must be deemed to possess the inherent incidental and ancillary power to grant interim relief which inhered in all such judicial bodies, and absence of an express provision in that behalf did not detract from the view that such power inhered in a Tribunal.

Six intervention applications were also filed by different persons and bodies from Karnataka, including the Advocate General of the State in support of the case of Karnataka.

An intervention application raising the contentions similar to those of State of Tamil Nadu was also filed by the Tamil Nadu Ryots' Association which had preferred the original Writ Petition on which a mandate to constitute the Tribunal was given.

Answering the Reference, this Court,

HELD : 1.1 The Karnataka Cauvery Basin Irrigation Protection Ordinance 1991 promulgated by Governor of Karnataka on 25th July, 1991 (subsequently enacted by the State Legislature as Act No. 27 of 1991) is beyond the legislative competence of the State and, is therefore, *ultra vires* the Constitution. [565 E]

1.2 The object of the provisions of the Ordinance is obvious coming close on the Order of the Tribunal and in the context of the stand taken by the State of Karnataka that the Tribunal has no power or jurisdiction to pass any interim relief, it is to override the said decision of the Tribunal and its implementation. The Ordinance has thus the effect of defying and nullifying any interim order of the Tribunal appointed under a law of the Parliament. The other effect of the Ordinance is to reserve to the State of Karnataka exclusively the right to appropriate as much of the water of river Cauvery and its tributaries as it deems requisite and in a manner and at periods it deems fit and proper, although pending final adjudication by the Tribunal. [546 F-G]

1.3 The Ordinance affects the jurisdiction of the Tribunal appointed under the Central Act, viz., the Inter-State Water Disputes Act, which has been made under Article 262 of the Constitution.

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A **The State of Karnataka has arrogated to itself the power to decide unilaterally whether the Tribunal has jurisdiction to pass the interim order or not and whether the order is binding on it or not. The State has presumed that till a final order is passed by the Tribunal, the State has the power to appropriate the waters of the river Cauvery to itself unmindful of and unconcerned with the con-**
B **sequences of such action on the lower riparian States, that it has superior rights over the said waters and it can deal with them in any manner, and the lower riparian States have no equitable rights and that it is the sole judge as to the share of the other riparian States in the said waters. Moreover, it has assumed the role of a judge in its own cause. [552 C, F-G]**

C

1.4 Apart from the fact that the Ordinance directly nullifies the decision of the Tribunal, it also challenges the decision of this Court, which has ruled that the Tribunal had power to consider the question of granting interim relief since it was specifically referred to it. The Ordinance further has an extra-territorial operation inas-
D **much as it interferes with the equitable rights of Tamil Nadu and Pondicherry to the waters of the Cauvery river. To the extent that the Ordinance interferes with the decision of this Court and of the Tribunal appointed under the Central legislation, it is clearly unconstitutional being not only in direct conflict with the provisions of Article 262 of the Constitution under which the said enactment is**
E **made, but being also in conflict with the judicial power of the State. [552 H, 553 A]**

1.5 The legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large but it cannot set aside
F **an individual decision inter-parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or Tribunal. [554 H, 555 A]**

Municipal Corporation of the City of Ahmedabad etc. **v.** *New Shorock Spg. & Wvg. Co., Ltd. etc.* **[1971] 1 SCR 288;** *Madan Mohan Pathak* **v.**
G *Union of India & Ors. etc.*, **[1978] 3 SCR 334 and** *P.Sambamurthy & Ors. etc. etc.* **v.** *State of Andhra Pradesh & Anr.*, **[1987] 1 SCR 879, referred to.**

1.6 Any executive order or a legislative enactment of a State which interferes with the adjudicatory process and adjudication by
H **such Tribunal is an interference with the judicial power of the State. In view of the fact that the Ordinance in question seeks directly to**

nullify the order of the Tribunal, it impinges upon the judicial power of the State. [555 C-D] A

1.7 Further, admittedly, the effect of the Ordinance is to affect the flow of the waters of the river Cauvery into the territory of Tamil Nadu and Pondicherry which are the lower riparian States. The Ordinance has, therefore, an extra-territorial operation, and is thus beyond the legislative competence of the State and is *ultra vires* the provisions of Article 245(1) of the Constitution. [555 E] B

1.8 The Ordinance is also against the basic tenets of the rule of law inasmuch as the State of Karnataka by issuing the Ordinance has sought to take law in its own hand and to be above the law. Such an act is an invitation to lawlessness and anarchy, inasmuch as the Ordinance is a manifestation of a desire on the part of the State to be a judge in its own cause and to defy the decisions of the judicial authorities. The action forebodes evil consequences to the federal structure under the Constitution and opens doors for each State to act in the way it desires disregarding not only the rights of the other States, the orders passed by instrumentalities constituted under an Act of Parliament but also the provisions of the Constitution. If the power of a State to issue such an Ordinance is upheld it will lead to the break down of the Constitutional mechanism and affect the unity and integrity of the nation. [555 F-G] C D

2.1 Under Article 131, this Court has original jurisdiction, among other things, in any dispute between two or more States where the dispute involves any question whether of law or fact on the existence and extent of which a legal right depends except those matters which are specifically excluded from the said jurisdiction by the proviso. However, the Parliament has also been given power by Article 262 of the Constitution to provide by law that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any dispute or complaint with respect to the use, distribution or control of the water of, or in, any inter-State river or river valley. Section 11 of the Inter-State Water Disputes Act, 1956, has in terms provided for such exclusion of the jurisdiction of the Courts. Thus, Section 11 of the Act read with Article 262 excludes original jurisdiction of the inter-State water dispute which may be referred to the Tribunal established under the Act from the purview of any Court including the Supreme Court under Article 131. [544 H, 545 A-B] E F G

2.2 The Inter-State Water Disputes Act, 1956 has been enacted only under Article 262 of the Constitution, and not under Entry 56, H

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A as it relates to the adjudication of the disputes and with no other aspect either of the inter-State river as a whole or of the waters in it. [550 G]

2.3 Entry 56 speaks of regulation and development of inter-State rivers and river valleys and does not relate to the disputes B between the riparian States with regard to the same and adjudication thereof. Even assuming that the expression "regulation and development" would in its width, include resolution of disputes arising out therefrom and a provision for adjudicating them, the Act does not make the declaration required under Entry 56. This is obviously not an accidental omission, but a deliberate disregard of C the Entry since it is not applicable to the subject-matter of the legislation. Further no Entry in either of the three Lists refers specifically to the adjudication of disputes with regard to inter-State river waters, the reason being that Article 262 of the Constitution specifically provides for such adjudication. [547 A-C]

D 2.4 An analysis of Article 262 shows that an exclusive power is given to the Parliament to enact a law providing for the adjudication of disputes or complaints relating to "use, distribution or control" of the waters of, or in any inter-State river or river valley. The words "use", "distribution" and "control" are of wide import and may include regulation and development of the said waters. E The provisions clearly indicate the amplitude of the scope of adjudication, inasmuch as it would take within its sweep the determination of the extent, and the manner, of the use of the said waters, and the power to give directions in respect of the same. [508 F-G]

2.5 The language of the Article has, further to be distinguished F from that of Entry 56 and Entry 17. Whereas Article 262(1) speaks of adjudication of any dispute or complaint and that too with respect to the use, distribution or control of the waters of or in any inter-State river or river valley, Entry 56 speaks of regulation and development of inter-State rivers and river valleys. Thus, the distinction between Article 262 and Entry 56 is that whereas former G speaks of adjudication of disputes with respect to use, distribution or control of the waters of any inter-State river or river valley, Entry 56 speaks of regulation and development of inter-State rivers and river valleys. Entry 17 likewise speaks of water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry H 56. It does not speak either of adjudication of disputes or of an

inter-State river as a whole and State can only deal with water within its territory. [547 H, 548 A-C] A

2.6 The Inter-State Disputes Act, 1956 is made pursuant to the provisions of Article 262 specifically for adjudication of the disputes between the riparian States with regard to the use, distribution or control of the waters of the inter-State rivers or river valleys, and is not relatable to Entry 56 and, therefore, does not cover either the field occupied by Entry 56 or by Entry 17. Since the subject of adjudication of the said disputes is taken care of specifically and exclusively by Article 262, by necessary implication the subject stands excluded from the field covered by Entries 56 and 17. It is not, therefore, permissible either for the Parliament under Entry 56 or for a State legislature under Entry 17 to enact a legislation providing for adjudication of the said disputes or in any manner affecting or interfering with the adjudication established by law under Article 262. This is apart from the fact that the State legislature would even otherwise be incompetent to provide for adjudication or to affect in any manner the adjudicatory process or the adjudication made in respect of the inter-State river waters beyond its territory or with regard to disputes between itself and another State relating to the use, distribution or control of such waters. Any such act on its part will be extra-territorial in nature and, *therefore, beyond its* competence. [549 C-F] B C D E

2.7 It is not correct to say that it is Entry 97 of the Union List, which deals with the topic of use, distribution and control of the waters of an inter-State river. This is so because the expression "regulation and development of inter-State rivers and river valleys" in Entry 56 would include the use, distribution and allocation of the waters of the inter-State rivers and river valleys between different riparian States. Otherwise, the intention of the Constituent Assembly to provide for the Union to take over the regulation and development under its control makes no sense and serves no purpose. Further, the River Boards Act, 1956, which is admittedly enacted under Entry 56 for the regulation and development of inter-State rivers and river valleys, does cover the field of the use, distribution and allocation of the waters of the inter-State rivers and river valleys, indicating that the expression "regulation and development" in Entry 56 has legislatively also been construed to include the use, distribution or allocation of the waters of the inter-State rivers and river valleys between riparian States. To contain the operation of Entry 17 to the waters of an inter-State river and river valleys F G H

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A within the boundaries of a State and to deny the competence to the State legislature to interfere with or to affect or to extend to the use, distribution and allocation of the waters of such river or river valley beyond its territory, directly or indirectly, it is not necessary to fall back on the residuary Entry 97, as an appropriate declaration under Entry 56 would suffice. The very basis of a federal Con-
B stitution mandates such interpretation and would not bear an interpretation to the contrary which will destroy the constitutional scheme and the Constitution itself. Although, therefore, it is possible technically to separate the "regulation and development" of the inter-State river and river valley from the "use, distribution and allocation" of its waters, it is neither warranted nor necessary to do so.
C [549 G, 550, B-F]

2.8 Though the waters of an inter-State river pass through the territories of the riparian States such waters cannot be said to be located in any one State. They are in a state of flow and no State can claim exclusive ownership of such waters so as to deprive the
D other States of their equitable share. Hence in respect of such waters, no State can effectively legislate for the use of such waters since its legislative power does not extend beyond its territories. It is further an acknowledged principle of distribution and allocation of waters between the riparian States that the same has to be done on the basis of the equitable share of each State. What the equitable
E share will be will depend upon the facts of each case. [551 H, 552 A-B]

3.1 The order of the Tribunal dated 25th June, 1991 granting interim relief constitutes a report and a decision within the meaning of Section 5(2) of the Inter-State Water Disputes Act, 1956. The said
F order is, therefore, required to be published by the Central Government in the Official Gazette under Section 6 of the Act in order to make it effective. [565 F-G]

3.2 Sub-section (1) of Section 5 expressly empowers the Central Government to refer to the Tribunal not only the main water dispute, but any matter appearing to be connected with or relevant
G to it. A request for an interim relief, whether in the nature of mandatory direction or prohibitory order, whether for the maintenance of *status quo* or for the grant of urgent relief or to prevent the final relief being rendered infructuous, would be a matter connected with or relevant to the main dispute. In fact, this Court, by its decision of April 26, 1991, has in terms held that the request of the State of
H Tamil Nadu for granting interim relief had been referred by the Central Government to the Tribunal and directed the Tribunal to

consider the request on merits, the same being a part of the Reference. Hence the order of the Tribunal will be a report and decision within the meaning of Section 5(2) and would have, therefore, to be published under Section 6 of the Act in order to make it effective. [562 A-C]

3.3 It is not correct to say that since the Order does not say that it is a report and decision it is not so under Section 5(2) of the Act. Either the Order is such a report and decision because of its contents or not so at all. If the contents do not show that it is such a report, it will not become one because the Order states so. The contents of the order clearly show that it is a report and a decision within the meaning of Section 5(2). [563 B]

3.4 The scope of the investigation that a Tribunal or a Court makes at the stage of passing an interim order is limited compared to that made before making the final adjudication. The extent and the nature of the investigation and the degree of satisfaction required for granting or rejecting the application for interim relief would depend upon the nature of the dispute, and the circumstances in each case. No hard and fast rule can be laid down in this respect. However, no Tribunal or court is prevented or prohibited from passing interim orders on the ground that it does not have at that stage all the material required to take the final decision. To read such an inhibition in the power of the Tribunal or a court is to deny to it the power to grant interim relief when Reference for such relief is made. Hence, the Tribunal constituted under the Act is not prevented from passing an interim order or direction, or granting an interim relief pursuant to the reference merely because at the interim stage it has not carried out a complete investigation which is required to be done before it makes its final report and gives its final decision. It can pass interim orders on such material as according to it is appropriate to the nature of the interim order. [563 E-H]

3.5 The interim orders passed or reliefs granted by the Tribunal when they are not of purely procedural nature and have to be implemented by the parties to make them effective, are deemed to be a report and a decision within the meaning of Sections 5(2) and 6 of the Act. [564 A]

3.6 In the instant case, Order of the Tribunal discusses the material on the basis of which it is made and gives a direction to the State of Karnataka to release water from its reservoirs in Karnataka so as to ensure that 205 TMC of water is available in Tamil Nadu's

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A Mettur reservoir in a year from June to May. It makes the order effective from 1st July, 1991 and also lays down a time-table to regulate the release of water from month to month. It also provides for adjustment of the supply of water during the said period. It further directs the State of Tamil Nadu to deliver 6 TMC of water for the Karaikal region of the Union Territory of Pondicherry. In B addition, it directs the State of Karnataka not to increase its area under irrigation by the waters of the river Cauvery beyond the existing 11.2 lakh acres. It further declares that it will remain operative till the final adjudication of the dispute. Thus, the order is not meant to be merely declaratory in nature but is meant to be implemented and given effect to by the parties. Hence, the order in C question constitutes a report and a decision within the meaning of Section 5(2) and is required to be published by the Central Government under Section 6 of the Act in order to be binding on the parties and to make it effective. [564 B-D]

3.7 It is not correct to say that Section 5(3) of the Act cannot D apply to the interim orders as it is only the final decision which is meant to undergo the second reference to the Tribunal provided for in it. If the Tribunal has power to make an interim decision when a reference for the same is made, that decision will also attract the said provisions. The Central Government or any State Government after considering even such decision may require an explanation or E guidance from the Tribunal as stated in the said provisions and such explanation and guidance may be sought within three months from the date of such decision. The Tribunal may then reconsider the decision and forward to the Central Government a further report giving such explanation or guidance as it deems fit. In such cases it is the interim decision thus reconsidered which has to be F published by the Central Government under Section 6 of the Act and becomes binding and effective. Therefore, there is no reason why the provisions of Section 5(3) should prevent or incapacitate the Tribunal from passing the interim order. Once a decision, whether interim or final, is made under Section 5(2) it attracts the provisions both of sub-section (3) of that Section as well as the provisions G of Section 6 of the Act. [564 E-G]

4.1 A Water Disputes Tribunal constituted under the Inter-State Water Disputes Act is competent to grant any interim relief to the parties to the dispute when a reference is made by the Central Government. Whether the Tribunal has power to grant relief when H no reference is made for such relief is a question which does not

arise in the facts and circumstances under which the Reference is made. [565 H, 566 A] A

4.2 This Court has held by its order dated 26th April, 1991 that the Central Government had made a reference to the Tribunal for the consideration of the claim for interim relief prayed for by the State of Tamil Nadu and hence the Tribunal had jurisdiction to consider the said request being a part of the Reference itself. Implicit in the said decision is the finding that the subject of interim relief is a matter connected with or relevant to the water dispute within the meaning of Section 5(1) of the Act. Hence the Central Government could refer the matter of granting interim relief to the Tribunal for adjudication. Although this Court has kept open the question, viz., whether the Tribunal has incidental, ancillary, inherent or implied power to grant the interim relief when no reference for grant of such relief is made to it, it has in terms concluded the second part of the question. [557 A-C] B C

4.3 It is impermissible for this Court to sit in appeal even in adjudicatory jurisdiction, nor is it competent for the President to invest this Court with an appellate jurisdiction, over the said decision through a Reference under Article 143 of the Constitution. [557 D] D

4.4 It is not correct to say that the question of grant of interim relief falls outside the purview of the provisions of Section 11 of the Inter-State Water Dispute Act and can be agitated under Article 131 of the Constitution. The effect of the provisions of Section 11 of the Act read with Article 262 of the Constitution is that the entire judicial power of the State, and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act. [555 B-D] E F

5. It is not correct to say that the President can refer any question of law under Article 143 and, therefore, also ask this Court to reconsider any of its decisions. In the first instance, the language of clause (1) of Article 143 is opposed to such a proposition. The clause empowers the President to refer for this Court's opinion a question of law or fact which has arisen or is likely to arise. When this Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is *res integra* so as to G H

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A require the President to know what the true position of law on the question is. The decision of this Court on a question of law is binding on all courts and authorities. Hence, under the said clause the President can refer a question of law only when this court has not decided it. Secondly, a decision given by this Court can be reviewed only under article 137 read with Rule I of Order XL of the the B Supreme Court Rules 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is *per incuriam* or is delivered in C the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. [557 E-H, 558 A-C]

The Delhi Laws Act, 1912, *The Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act,* 1950 (1951) SCR 747, distinguished.

D

The Bengal Immunity Company Ltd. v. *The State of Bihar & Ors.,* [1955] 2 SCR 603, relied on.

Jatindra Nath Gupta v. *The Province of Bihar & Ors.,* [1949] FCR 595; *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque & Ors.,* [1955] 1 SCR E 1104; *Delhi Judicial Service Association, Tis Hazari Court, Delhi etc.* v. *State of Gujarat & Ors. etc.,* JT (1991) 3 SC 617and *State of Bombay* v. *Gajanan Mahadev Badley,* AIR 1954 Bombay 351, referred to.

5.2 Under the Constitution appellate jurisdiction over the earF lier decision does not vest in this Court; nor can it be vested in it by the President under Article 143. If it is accepted that the President can ask this Court to reconsider any of its decisions it would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise G its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary. [558 D]

5.3 The facts in A.R.Antulay's case are peculiar and the decision therein has to be confined to those special facts. Further the decision being inter-parties operates as *res judicata* and cannot be H reopened. [560 G, 561 E]

A.R.Antulay v. *R.S. Nayak & Anr.*, **[1988] Suppl. 1 SCR 1 and** *R.S.Nayak* **v.** *A. R. Antulay,* **[1984] 2 SCR 495, referred to.**

6. No opinion is expressed on the question whether the opinion given by this Court on a Presidential Reference under Article 143 of the Constitution, such as the present one, is binding on all courts, firstly, because the question does not form part of the Reference, and, secondly, any opinion expressed on it would again be advisory. However, adjudicatively it has been held by this Court that the advisory opinion is entitled to due weight and respect and normally, it will be followed. The said view holds the field today and may usefully continue to do so till a more opportune time. [565 C-D]

ADVISORY JURISDICTION: Special Reference No. 1 of 1991.

(Under Article 143 of the Constitution of India).

G. Ramaswamy, Attorney General, V.R.Reddy, Addl. Solicitor General, F.S. Nariman, T.R. Andhyarujina, Dr. Y.S. Chitale, S.S. Javali, K. Parasaran, A.K. Ganguli, K.K. Venugopal, A.S. Nambiar, Shanti Bhushan, P.P. Rao, P.P. Muthanna, K. Subramanian, Curiae Joseph, N.N.Gangadeb, Ms. A. Subhashini, Ms. Niranjana Singh, M.Veerappa, Subhash Sharma, Mohan Katarki, Atul Chitale, K.H. Nobin Singh, Subbanna, A. Subba Rao, G. Umapathy, E.C. Agarwala, P.N. Ramalingam, Smt. Shante Vasudevan, P. Krishnamurthy, P.K. Manohar, K.V. Viswanathan, Shalid Rizvi, Ashok Mukhoty, Mrs. Sangeeta Garg, Jayant Bhushan, T.T. Kunhikanan, M.D.B. Raju, G. Prabhakar, N. Ganpathi, S.R. Bhat, P. Mahale and P.R. Ramasesh for the appearing parties.

A.K. Sen, Venkataraman and C.S. Vaidyanathan for the Intervener.

The Report of the Court was delivered by

SAWANT, J. On July 27, 1991 the President, under Article 143 of the Constitution, referred to this Court three questions for its opinion. The Reference reads as follows. :

> "Whereas, in exercise of the powers conferred by Section 4 of the Inter-State Water Disputes Act, 1956 (hereinafter referred to as "the Act"), the Central Government constituted a Water Disputes Tribunal Called "the Cauvery Water Disputes Tribunal" (hereinafter called "the Tribunal") by a notification dated 2 June, 1990, a copy whereof is annexed hereto, for the adjudi-

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cation of the Water Dispute regarding the Inter-State River Cauvery ;

WHEREAS on 25 June 1991, the Tribunal passed an interim Order (hereinafter referred to as "the Order"), a copy whereof is annexed hereto;

WHEREAS, differences have arisen with regard to certain aspects of the Order;

WHEREAS, on 25 July 1991, the Governor of Karnataka promulgated the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 (hereinafter referred to as "the Ordinance"), a copy whereof is annexed hereto;

WHEREAS, doubts have been expressed with regard to the constitutional validity of the Ordinance and its provisions;

WHEREAS, there is likelihood of the constitutional validity of the provisions of the Ordinance, and any action taken thereunder, being challenged in Courts of law involving protracted and avoidable litigation;

WHEREAS, the said differences and doubts have given rise to a public controversy which may lead to undesirable consequences;

AND WHEREAS, in view of what is hereinbefore stated, it appears to me that the following questions of law have arisen and are of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon;

NOW, THEREFORE, in exercise of the powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Ramaswamy Venkataraman, President of India, hereby refer the following question to the Supreme Court of India for consideration and report thereon, namely:

(1) Whether the Ordinance and the provisions thereof are in accordance with the provisions of the Constitution;

(2) (i) Whether the Order of the Tribunal constitutes a report and a decision within the meaning of section 5 (2) of the Act; and

(ii) Whether the Order of the Tribunal is required to be published by the Central Government in order to make it effective;

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(3) Whether the Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute."

To appreciate the significance of the questions referred and our answers to them, it is necessary to understand the factual background which has led to the Reference.

The river Cauvery is an inter-State river and is one of the major rivers of the Southern Peninsula. The basin area of the river and its tributaries has substantial spread-over within the territories of the two States, namely, Karnataka and Tamil Nadu, Karnataka being the upper riparian State and Tamil Nadu being the lower riparian State. The other areas which are the beneficiaries of the river water are the territories comprised in the State of Kerala and in the Union Territory of Pondicherry. The total length of the river from its head to its outflow into the Bay of Bengal is about 802 kms. It travels about 381 kms. in Southern-Easternly direction before it reaches the border of Karnataka and Tamil Nadu. It also constitutes boundary between the said two States to an extent about 64 kms. and then traverses a distance of about 357 kms. in Tamil Nadu before joining the sea.

There were two agreements of 1892 and 1924 for sharing the water of the river between the areas which are predominantly today comprised in the State of Karnataka and Tamil Nadu,. and which were at the time of the agreements comprised in the then Presidency of Madras on the one hand and the State of Mysore on the other. The last agreement expired in 1974. The river presently covers three States of Karnataka, Tamil Nadu and Kerala and the Union Territory of Pondicherry. The present State of Tamil Nadu has an area of about 43,868 sq. kms. of the Cauvery River basin, reducing the basin area which at the time of the agreement was about 49,136 sq. kms. As against this the basin area of the said river which was about 28,887 sq. kms. in the State of Mysore has incrcased to about 34,273 sq. kms. in the present State of Karnataka.

The contributions made to the flows of the Cauvery River by Karnataka, Tamil Nadu and Kerala, according to the State of Karnataka is 425 TMC, 252 TMC and 113 TMC respectively together amounting to 790 TMC. According to the State of Tamil Nadu, the contributions of the three States respectively are 392 TMC, 222 TMC and 126 TMC respectively together amounting to 740 TMC. The Study Team appointed by the Central Government in 1974 worked out the appropriations of the respective States as follows: Karnataka—177 TMC, Tamil Nadu including Pondicherry—489 TMC and Kerala—5 TMC.

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A In 1956 the Parliament enacted the River Boards Act, 1956 for the purpose of regulation and development of inter-State rivers and river valleys and also the Inter-State Water Disputes Act, 1956 for adjudication of disputes with regard to the use, distribution or control etc. of the said waters. In 1970 Tamil Nadu invoked the provisions of Section 3 of the Inter-State Water Disputes Act, 1956 and requested the Central Government for reference of the dispute between the two States, viz. Tamil Nadu and Karnataka to a Tribunal under the Act. The Central Government initiated negotiations between the two States. Simultaneously, Tamil Nadu moved this Court by means of a suit under Article 131 of the Constitution being Suit No.1 of 1971 seeking a direction to the Union Government to constitute a Tribunal and to refer the dispute to it. In the said suit, Tamil Nadu applied for an interim order to restrain the State of Karnataka from proceeding with and executing the projects mentioned therein. This Court by its Order of 25th January, 1971 dismissed the application for interim relief.

It appears that the negotiations between the two states which were going on in the meanwhile, resulted in the constitution of a Fact Finding Committee in June 1972 which was set up to ascertain facts, amongst others as to the availability of water resources, the extent of utilisation and the nature of the areas in the respective States within the river basin, and their requirements. In view of the constitution of the Committee, Tamil Nadu withdrew its suit.

The Fact Finding Committee submitted its Reports in December, 1972, and August 1973. A Central Study Team headed by Shri CC. Patel, then Addl. Secretary to Government of India, in the Ministry of Irrigation was also set up to examine the question of assessing the savings of water in the existing and planned projects of the three States in the Cauvery basin. The recommendation of the Study Team on improvement and modernisation of the irrigation system including the strengthening of the works and the lining of channels, integrated operations of the reservoirs within the Cauvery basin, scientific assessment of water requirement in the command area and for monitoring the releases from the reservoirs for an efficient tie up between the rainfall and command, water requirement and release were announced at the Inter-State Conference of June 1974.

Further negotiations resulted in what is known as "the 1976 Understanding". This Understanding envisaged the apportionment of the surplus water in the ratio of 30:53:17 amongest the States of Tamil Nadu, Karnataka and Kerala respectively. In the case of savings, the Study Team proposed the apportionment in the ratio of 87 TMC to Karnataka, 4 TMC to Tamil Nadu and 34 TMC to Kerala.

It appears that in spite of the information gathered through the Fact Finding Committee and the Study Team set up by the Union Government, the negotiations were not fruitful. In 1983, Tamil Nadu Ryots Association presented a petition to this Court under Article 32 of the Constitution being Writ Petition No. 13347 of 1983. The petition sought issue of a writ of mandamus to the Central Government requiring it to refer the dispute to a Tribunal under the Act. The petition was also accompanied by an application seeking interim relief. The State of Tamil Nadu supported the Writ Petition. Notices were issued to the respondents including the Union Government and the State of Karanataka. The petition remained pending in this Court for nearly seven years. No application for interim relief was moved during this period.

Although the inter-State meetings continued to be held during this period, nothing worthwhile emerged out of them. Hence, in June 1986, the State of Tamil Nadu lodged a Letter of Request under Section 3 of the Act with the Central Government for the Constitution of a Tribunal and for reference of the water dispute for adjudication to it. In the said letter, Tamil Nadu primarily made a grievance against the construction of works in the Karnataka area and the anpropriaion of water upstream so as to prejudice the interests down-stream in the State of Tamil Nadu. It also sought the implementation of the agreements of 1892 and 1924 which had expired in 1974.

At the hearing of the Writ Petition filed by the Tamil Nadu Ryots Association, the Central Government left the matter to the Court. This Court taking into consideration the course of negotiations and the length of time which had passed, by its judgment dated May 4, 1990 held that the negotiations between the two States had failed and directed the Union Government to constitute a Tribunal under Section 4 of the Act. In pursuance of the directions given by this Court, the Union Government by its notification dated June 2, 1990, constituted the Cauvery Water Disputes Tribunal and by another Notification of the even date referred to it the water dispute emerging from Tamil Nadu's Letter of Request dated July 6, 1986.

2. The Cauvery Water Disputes Tribunal (hereinafter referred to as the "Tribunal") commenced its first sitting on 20th July, 1990. On that day, Tamil Nadu submitted a letter before the Tribunal seeking interim reliefs. The Tribunal directed Tamil Nadu to submit a proper application. Thereupon Tamil Nadu and the Union Territory of Pondicherry submitted two separate applications for interim reliefs being CMP Nos. 4 and 5 of 1990.

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A The interim relief claimed by Tamil Nadu was that Karnataka be directed not to impound or utilise water of Cauvery river beyond the extent impounded or utilised by them as on 31-5-1972, as agreed to by the Chief Ministers of the basin States and the Union Minister for Irrigation and Powers. It further sought passing of an order restraining Karnataka from undertaking any new projects, dams, reservoirs, canals and/or from B proceeding further with the construction of projects, dams, reservoirs, canals etc. in the Cauvery basin.

In its application for interim relief Pondicharry sought a direction from the Tribunal both to Karnataka and Tamil Nadu to release the water already agreed to i.e., 9.355 TMC during the months of September to C March.

The Tribunal considered simultaneously both the applications for interim reliefs as well as the procedure governing the trial of the main dispute. It directed the disputant States to file their pleading by way of statements of cases and also required the States of Karnataka and Kerala D to submit their replies to the applications for interim reliefs made by Tamil Nadu and Pondicherry. By September 1990, all the disputant States submitted their first round of pleadings or statements of cases. By November 1990, Karnataka and Kerala also submitted their replies to the applications for interim reliefs. The Tribunal gave time to the States to submit their respective counter statements in reply to the Statements of cases E filed earlier in the main dispute.

It appears that before the disputant states submitted their counter statements in the main dispute, the Tribunal heard the applications for interim reliefs since Tamil Nadu had, in the meanwhile, filed an application being CMP No.9 of 1990 as an urgent petition to direct Karnataka as F an emergent measure to release at least 20 TMC of water as the first instalment, pending final orders on their interim application CMP No.4/90. It appears that this application was filed on the ground that the samba crop could not be sustained without additional supplies at Mettur reservoir in the Tamil Nadu State. Besides contesting the application on merits, both Karnataka and Kerala raised a preliminary objection to the jurisdic- G tion of the Tribunal to entertain the said application and to grant any interim relief. The preliminary objection was that the Tribunal constituted under Act, had a limited jurisdiction. It had no inherent powers as an ordinary Civil Court has, and there was no provision of law which authorised or conferred jurisdiction on the Tribunal to grant any interim relief. The Tribunal heard the parties both on the preliminary objection as well H

as on merits, and by its Order of January 5, 1991, held, among other things, as follows :- A

> ".....This Act is a complete code in so far as the reference of a dispute is concerned. In the circumstances, in our opinion, the Tribunal is authorised to decide only the 'water dispute' or disputes which have been referred to it. If the Central Government is of the opinion that there is any other matter connected with or relevant to the 'water dispute' which has already been referred to the Tribunal, it is always open to the Central Government to refer also the said matter as a dispute to the Tribunal constituted under Section 4 of the Act. Further, no water dispute can be referred by the Central Government unless the Central Government is of the opinion that the said dispute cannot be settled by negotiations. In fact, no water dispute can be adjudicated without its reference to the Tribunal. B C
>
> The interim reliefs which have been sought for even if the same are connected with or relevant to the water dispute already referred, cannot be considered because the disputes in respect of the said matters have not been referred by the Central Government to the Tribunal. Further, neither there is any averment in these petitions that the dispute related to interim relief cannot be settled by negotiations and that the Central Government has already formed the opinion that it shall be referred to the tribunal. In case the petitioners of CMP Nos. 4,5 and 9 of 1990 are aggrieved by the conduct of the State of Karnataka and an emergent situation had arisen, as claimed, they could have raised a dispute before the Central Government and in case the Central Government was of the opinion that the said dispute could not be settled by negotiations, the said dispute could also have been referred by the Central Government to the Tribunal. In case such a dispute had been referred then it would have been open to the Tribunal to decide the said dispute which decision would then be final and binding on the parties. D E F
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> From the letter dated 6.7.1986, which was the request made on behalf of the State of Tamil Nadu to the Central Government for referring the dispute to the Tribunal, it is clear that the dispute which has been referred to this Tribunal in regard to the executive action taken by the Karnataka State in construct- H

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ing Kabini, Hemavathi, Harangi, Swarnavathi and other projects and expanding the ayacuts and the failure of the Karnataka Government to implement the agreements of 1892 and 1924 relating to the use, distribution and the control of Cauvery waters. No interim dispute in regard to the release of waters by the Karnataka Government from year to year subsequent to the date of the request made by the State of Tamil Nadu was at all referred to the Tribunal. The Tribunal has been called upon to decide the main water dispute, which, when adjudicated upon, would undoubtedly be binding on the parties. In view of the above, we are of the opinion that the Tribunal cannot entertain the prayer for interim relief unless the dispute relating to the same is specifically referred to the Tribunal.

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The observations made by Hon'ble Supreme Court in *Union of India* v. *Paras Lamines (P) Ltd.*, [1990] 4 SCC 453-supplied were in relation to the Appellate Tribunal constituted under the Customs Act, 1962. It was held that the Tribunal functions is a court within the limits of its jurisdiction. Its area of jurisdiction is defined but within the bounds of its jurisdiction it has all the powers expressly and impliedly granted. The Supreme Court while discussing the extent of the power of the Tribunal in respect of the grant made by a particular Statute held that the Tribunal will have all incidental and ancillary powers for doing of such acts or employing all such means as are reasonably necessary to make the grant effective. The import of the decision of the Hon'ble Supreme Court is that the Tribunal will have incidental and ancillary powers while exercising the powers expressly conferred. These incidental and ancillary powers must relate to the actual dispute referred and not to any other matter including granting of interim reliefs which are not at all subject matter of reference.

In our opinion what the Supreme Court intended to hold was that the Tribunal has incidental and ancillary powers to pass orders in respect of a reference for adjudication of which it has been constituted. It has not, however, further laid (sic.) that it has also incidental and ancillary powers to grant relief in respect of a dispute which has not at all been referred.

In the instant case, the water dispute which has been referred to us is that which emerges from the letter of the State of

Tamil Nadu dated 6th July, 1986. The Tribunal will have the power to pass such consequential orders as are required to be made while deciding the said dispute and will also have incidental and ancillary powers which will make the decision of the reference effective but these powers are to be exercised only to enable it to decide the reference effectively but not to decide disputes not referred including a dispute in regard to grant of interim relief/interim reliefs.

x x x x x x x x x

The Second submission raised by the learned counsel for Tamil Nadu namely to the effect that the Tribunal alone could exercise jurisdiction in respect of a water dispute by virtue of Article 262 of the Constitution of India and in case Tribunal holds otherwise the State of Tamil Nadu will be left with no remedy available to it, it may be stated that since we have taken the view that in case a water dispute really arises and such water dispute could not be resolved by negotiations then it will be open to the Central Government to refer the said dispute to the Tribunal for adjudication, the question of not having a remedy for a wrong does not arise before the Tribunal. The Central Government if it finds that the dispute is connected with or related to the water dispute already referred to the Tribunal, it is open to it to refer the said dispute also to the Tribunal in regard to the granting of an interim relief."

In the view that it took, as above, the Tribunal held that it could not entertain the said applications for grant of interim reliefs as they were not maintainable in law, and dismissed the same.

3. Being aggrieved, the State of Tamil Nadu approached this Hon'ble Court by means of special leave petitions under Article 136 of the Constitution against the orders passed both in the original application for interim relief being CMP No.4 of 1990 as well as in the application for urgent interim relief being CMP No.9 of 1990. So did the Union Territory of Pondicherry against the order passed by the Tribunal in its application for interim relief being CMP No.5 of 1990. These special leave petitions which were later on converted into Civil Appeals Nos.303-04 of 1991 and Civil Appeal No. 2036 of 1991 respectively, were heard together and disposed of by this Court by its judgment dated April 26, 1991. While allowing the appeals this Court held as follows:

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A "Thus, we hold that this Court is the ultimate interpreter of the provisions of the Inter-State Water Disputes Act, 1956 and has an authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. This Court has not only the power but obligation to decide as to whether the Tribunal has any jurisdiction or not under the Act, to entertain any B interim application till it finally decides the dispute referred to it.

x x x x x x x x x

A perusal of the order of reference dated 2.6.90 as already extracted above clearly goes to show that the Central Govern- C ment had referred the water disputes regarding the inter-State river Cauvery and the river valley thereof, emerging from letter dated 6th July, 1986 from the Government of Tamilnadu. Thus all the disputes emerging from letter dated 6th July, 1986 had been referred to the Tribunal. The Tribunal committed a serious error in omitting to read the following important para- D graph contained in the aforesaid letter dated 6.7.86."

This Court then quoted the said paragraph from the said letter of 6.7.1986 which reads as follows:

"*REQUEST FOR EXPEDITIOUS ACTION IN REFERRING THE* E *DISPUTE TO TRIBUNAL:*

From 1974-75 onwards, the Government of Karnataka has been impounding all the flows in their reservoirs. Only after their reservoirs are filled up, the surplus flows are let down. The injury inflicted on this State in the past decade due to the unilateral action of Karnataka and the suffering we had in F running around for a few TMC of water every time and crops reached the withering stage has been briefly stated in note (Enclosure-XXVIII). It is patent that the Government of Karnataka have badly violated the inter-State agreements and caused irreparable harm to the age old irrigation in this State. Year after year, the realisation at Mettur is falling fast and thou- G sands of acres in our ayacut in the basin are forced to remain fallow. The bulk of the existing ayacut in Tamil Nadu concentrated mainly in Thanjavur and Thiruchirappalli districts is already gravely affected in that the cultivation operations are getting long delayed, traditional double crop lands are getting reduced to single crop lands and crops even in the single crop H lands are withering and falling for want of adequate wettings

at crucial times. We are convinced that the in ordinate delay in solving the dispute is taken advantage of by the Government of Karnataka in extending their canal systems and their ayacut in the new projects and every day of delay in adding to the injury caused to our existing irrigation."

The Court then proceeded to observe as follows:

"The above passage clearly goes to show that the State of Tamilnadu was claiming for an immediate relief as year after year, the realisation of Mettur was falling fast and thousands of acres in their ayacut in the basin were forced to remain fallow. It was specifically mentioned that the inordinate delay in solving the dispute is taken advantage of by the Government of Karnataka in extending their canal systems and their ayacut in the new projects and every day of delay is adding to the injury caused to their existing irrigation. The Tribunal was thus clearly wrong in holding that the Central Government had not made any reference for granting any interim relief. We are not concerned, whether the appellants are entitled or not, for any interim relief on merits, but we are clearly of the view that the reliefs prayed by the appellants in their C.M.P. Nos. 4, 5 and 9 of 1990 clearly come within the purview of the dispute referred by the Central Government under Section 5 of the Act. The Tribunal has not held that it had not incidental and ancillary powers for granting an interim relief, but it has refused to entertain the C.M.P. Nos.4,5 and 9 on the ground that the reliefs prayed in these applications had not been referred by the Central Government. In view of the above circumstances we think it is not necessary for us to decide in this case, the larger question-whether the Tribunal constituted under the Water Disputes Act has any power or not to grant any interim relief. In the present case the appellants become entitled to succeed on the basis of the finding recorded by us in their favour that the reliefs prayed by them in their C.M.P. Nos. 4,5 and 9 of 1990 are covered in the reference made by the Central Government. It may also be noted that at the fag end of the arguments it was submitted before us on behalf of the State of Karnataka that they were agreeable to proceed with the C.M.P.s on merits before the Tribunal on the terms that all party States agreed that all questions arising out of or connected with or relevant to the water dispute (set out in the respective pleadings of the respective parties), including all

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A applications for interim directions/reliefs by party States be determined by the Tribunal on merits. However, the above terms were not agreeable to the State of Tamilnadu as such we have decided the appeals on merits."

In view of its findings as above, this court by the said order directed the Tribunal to decide CMPs Nos. 4, 5 and 9 of 1990 on merits. In B pursuance of these directions, the Tribunal heard the said applications of Tamil Nadu and Pondicherry. It appears that before the Tribunal, objections were again raised on behalf of the State of Karnataka with regard to the maintainability of the applications filed by Tamil Nadu and Pondicherry for interim reliefs. The Tribunal did not countenance the said objections C holding that the direction given by this Court was binding on it. The Tribunal then proceeded to decide the applications on merits and by its order dated June 25, 1991 held as follows:

"When we are deliberating whether any emergent order ought to be passed, our prime consideration ought to be to preserve, as far as possible, pending final adjudication the rights of the D parties and also to ensure that by unilateral action of one party other party is not prejudiced from getting appropriate relief at the time of the passing of the final orders. We ought to also endeavour to prevent the commission of any act by the parties which might impede the Tribunal from making final orders in conformity with the principles of fair and equitable distribu- E tion of the waters of this inter-State river.

x x x x x x x x x

.....At this stage it would be neither feasible nor reasonable to determine how to satisfy the needs of the each State to the greatest extent possible with a minimum of detriment to oth- F ers. We do not also propose at this stage to enter into the question whether the present use of water of the river Cauvery either by the State of Tamil Nandu or the State of Karnataka is the most beneficial use to which the water could be put to.

x x x x x x x x x

.....We do not propose to examine at this stage the legality or G justifiability of erection of these reservoirs, dams, canals, etc. The said matters may be gone into if found necessary at the appropriate stage. In this case it would be in accordance with justice to fix the annual releases into Mettur Dam by making average of the same for a number of normal years in the immediate past.

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x x x x x x x x x

> .....We have already mentioned that at the present stage we would be guided by consideration of balance of convenience and maintenance of the existing utilisation so that rights of the parties may be preserved till the final adjudication....".

The Tribunal then directed the State of Karnataka to release water from its reservoirs in Karnataka so as to ensure that 205 TMC water is available in Tamil Nadu's Mettur reservoir in a year from June to May. The Tribunal further directed Karnataka to regulate the release of water every year in the manner stated in the order. The monthly quota of the water was to be released in four equal instalments every week, and if there was not sufficient water available in any week the deficit was directed to be made good in the subsequent week. The Tribunal also directed Tamil Nadu to deliver to Pondicherry 6 TMC water for its Karaikal region in a regulated manner. In addition, the Tribunal directed Karnataka not to increase its area under irrigation by the waters of Cauvery, beyond the existing 11.2 lakh acres. The Tribunal then observed that its said order would remain operative till the final adjudication of the dispute referred to it.

Thereafter, on July 25, 1991 the Governor of Karnataka issued an Ordinance named "the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991" which reads as follows:

> "An Ordinance to provide in the interest of the general public for the protection and preservation of irrigation in irrigable areas of the Cauvery basin in Karnataka dependent on the waters of the Cauvery river and its tributaries.
>
> Whereas the karnataka Legislative Councii is not in Session and the Governor of Karnataka is satisfied that circumstances exists which render it necessary for him to take immediate action, for the protection and preservation of irrigation in the irrigable areas of the Cauvery basin in Karnataka dependent on the water of Cauvery river and its tributaries.
>
> Now, therefore, in exercise of the power conferred under clause (1) of Article 213 of Constitution of India, I, Khurshed Alam Khan, Governor of Karnataka, am pleased to promulgate the following Ordinance, namely:-
>
> **1. Short title, extent and commencement:-**
>
> (1) This Ordinance may be called the Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991.

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(2) It extends to the whole of the State of Karnataka.

(3) It shall come into force at once.

2. Definition: Unless the context otherwise requires:-

(a) "Cauvery basin" means the basin area of the Cauvery river and its tributaries lying within the territory of the State of Karnataka.

(b) "Irrigable area" means the areas specified in the Schedule.

(c) "Schedule" means the Schedule annexed to this Ordinance.

(d) "Water year" means the year commencing with the 1st of June of a Calendar year and ending with the 31st of May of the next Calendar year.

3. Protection of Irrigation in irrigable area:

(1) It shall be the duty of the State Government to protect, preserve and maintain irrigation from the waters of the Cauvery river and its tributaries in the irrigable area under the various projects specified in the Schedule.

(2) For the purpose of giving effect to sub-section (1) the State Government may abstract or cause to be abstracted, during every water year, such quantity of water as it may deem requisite, from the flows of the Cauvery river and its tributaries, in such manner and during such intervals as the State Government or any Officer, not below the rank of an Engineer-in-Chief designated by it, may deem fit and proper.

4. Overriding effect of the Ordinance:-

The provisions of this Ordinance, (and of any Rules and Orders made thereunder), shall have effect notwithstanding anything contained in any order, report or decision of any Court or Tribunal (whether made before or after the commencement of this Ordinance), save and except a final decision under the provisions of sub-section (2) of section 5 read with section 6 of the Inter-State Water Disputes Act, 1956.

5. Power to remove difficulties:-

If any difficulty arises in giving effect to the provisions of this Ordinance, the State Government may, by order, as occasion

requires, do anything (not inconsistent with the provisions of this Ordinance) which appears to be necessary for purpose of removing the difficulty.

6. Power to make rules:-

(1) The State Government may, by Notification in the Official Gazette make rules to carry out the purpose of this Ordinance.

(2) Every rule made under this Ordinance shall be laid as may be after it is made, before each House of the State Legislature while it is in Session for a total period of thirty days which may be comprised in one Session or in two or more Sessions and if before the expiry of the said period, either House of the State Legislature makes any modification in any rule or order directs that any rule or order shall not have effect, and if the modification or direction is agreed to by the other House, such rule or order shall thereafter have effect only in such modified form or be no effect, as the case may be."

The Schedule mentioned in the Notification refers to the irrigable areas in Cauvery basin of karnataka under various projects including minor irrigation works.

Hot on the heels of this Ordinance, the State of Karnataka instituted a suit under Article 131 against the State of Tamil Nadu and others for a declaration that the Tribunal's order granting interim relief was without jurisdiction and, therefore, null and void etc.

Another development which may be noticed is that the Ordinance has since been replaced by Act No.27 of 1991. The provisions of the Act are a verbatim reproduction of the provisions of the Ordinance except that in Section 4 of the Act the words "any court or" are omitted and Section 7 is added repealing the Ordinance. The omission of the above words excludes this court's order dated April 26, 1991 from the overriding effect of the said provision. Reference to the Ordinance hereafter will include reference to the Act also unless the context otherwise requires.

4. It is in the context of these developments that the President has made the Reference which is set out in the beginning.

5. Before us are arraigned the State of Tamil Nadu and the Union Territory of Pondicherry on the one hand the States of Karnataka and Kerala on

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A the other with the Union of Indian taking no side on the issues arising out of the Reference. There are also interveners on both sides. The contentions of the parties are summarised hereafter. The contentions also include a plea on both sides not to answer either all or one or the other question raised in the Reference for reasons differently advanced. These pleas will also be dealt with at their proper places. Before we deal with the contenB tions, it is necessary to note certain features of the Reference which are also alluded to in the contentions of the parties. The Reference is made under Article 143 (1) of the Constitution of India seeking opinion of this Court under its advisory jurisdiction. As has been stated in the preamble of the Reference and is also not disputed before us, the first two questions are obviously the outcome of the dispute relating to the sharing of waters C between Tamil Nadu and Pondicherry on the one hand and Karnataka and Kerala on the other and the developments that took place in the said dispute till the date of Reference. As has been contended on behalf of Tamil Nadu and Pondicherry, even the third question has a relation to the dispute and the said events, and is not general in nature though it is couched in general terms. According to them, the question has been posed D with an oblique motive of getting over the judgement of this Court dated April 26, 1991 and the consequent order of the Tribunal dated June 25, 1991. Hence the said question should not be answered. Their other contention is that if the question is general in nature, it requires no answer at all.

E 6. The contentions of the parties on the questions referred may now be summarised.

With reference to Question 1 the State of Karnataka contends, in the light of the presumption of constitutional validity which ordinarily attaches to a legislation, that the onus lies heavily on the party challenging F the same to show that the impugned Ordinance (now Act) is *ultra vires* the Constitution. The impugned legislation clearly falls within the competence of the State legislature under Entry 17 as well as Entries 14 and 18 of List II in the Seventh Shedule of the Constitution. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power fall within Entry 17 of List II (hereinafter reG ferred to as 'Entry 17') and the State Legislature has every right to legislate on the subject and this legislative power is subject only to Entry-56 of List I (hereinafter referred to as 'Entry 56'). That Entry deals with regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. H This Entry, it is contended, does not denude the States of the power to

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legislate under Entry 17, since it merely empowers the Union, if Parliament has by law declared it to be in public interest, that the 'regulation and development of inter-State rivers and river valleys should, to the extent the declaration permits, be taken under the control of the Union. On a plain reading of the said Entry it is evident that barring regulation and development' of an inter-State river, subject to the declaration, the Central Government is not conferred with the power to legislate on water, etc., which is within the exclusive domain of the State legislatures. The River Boards Act, 1956 being the only legislation made by Parliament under Entry 56, and the scope of the declaration in section 2 thereof being limited 'to the extent hereinafter provided', that is to say provided by that statute, and no River Board having been constituted thus far in respect of and inter-State river under the said law, the power to legislate under Entry 17 is not whittled down or restricted. Thus, contends the State of Karnataka, the River Boards Act merely authorises the Union to set up a River Board with a view to take under its control the regulation and development of inter-State rivers without in any manner restricting or controlling the legislative power under Entry 17. But in the absence of the constitution of a River Board for Cauvery, it is contended that the State of Karnataka retains full legislative power to make laws as if Entry 17 has remained untouched. Further, the executive power of the Union under Article 73 cannot extend to any State with respect to matters on which the State alone can legislate in view of the field having been covered by Article 162 of the Constitution. Since the Act enacted under Article 262 of the Constitution does not attract any Entry in list I, it is a law essentially meant to provide for the adjudication of a dispute with respect to the use, distribution or control of waters of, or in, any inter-State river or river valley and does not, therefore, step on the toe of Entry 17. What the Ordinance (now Act) seeks to do is to impose by section 3 a duty on the State Government to protect, preserve and maintain irrigation from Cauvery waters in the irrigable areas falling within the various projects specified in the Schedule to the said legislation. The State of Karnataka, therefore, contends that the impugned legislation is clearly within the scope of the State's power to legislate and is, therefore, *intra-vires* the Constitution. A forteriori, the power to legislate conferred on the State legislature by Entries 14, 17 and 18 of List II, cannot be inhibited by an interim order of the Tribunal since the scheme of the Act envisages only one final report or decision of the Tribunal under section 5 (2) which would have to be gazetted under section 6 thereof. Until a final adjudication is made by the Tribunal determining the shares of the respective States in the waters of an inter-State river, the States would be free to make optimum use of water within the State and the Tribunal cannot interfere with such use under the guise of an interim order. Consequently it was open to the

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A Karnataka Legislature to make a law ignoring or overriding the interim order of the Tribunal.

With regard to Question 2 (i) of the Reference, the State of Karnataka contends that the scheme of the Act does not envisage the making of an interim order by the Tribunal. Section 5 of the Act provides that after a B Tribunal has been constituted under section 4, the Central Government shall refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the Tribunal for adjudication. On such Reference the Tribunal must investigate the matters referred to it and forward a report setting out the facts found by it and giving its decision on the matters referred to it. If upon consideration of the decision, the Cen- C tral Government or any State Government is of opinion that anything contained therein requires explanation or that guidance is needed upon any point not originally referred to the Tribunal, such Government may within three months from the decision again refer the matter for further consideration, and on such reference, the Tribunal may forward a further report giving such explanation and guidance as it deems fit and thereupon D the decision of the Tribunal shall be deemed to be modified accordingly. Section 6 then enjoins upon the Central Government to publish the decision of the Tribunal in the Official Gazette and on such publication 'the decision shall be final and binding on the parties to the dispute and shall be given effect to by them'. It is contended by the State of Karnataka that the scheme of the aforestated provisions clearly envisages that once a E water dispute is referred to the Tribunal' the Tribunal must 'investigate' the matters referred to it and forward a report to the Central Government 'setting out the facts found by it' and 'giving its decision' on the matters referred to it. It is this decision which the Central Government must publish in the Official Gazette to make it final and binding on the parties to the dispute. The State of Karnataka, therefore, contends that the scheme F of the Act contemplates only one final report made after full investigation in which findings of fact would be set out along with the Tribunal's decision on the matters referred to it for adjudication, and does not contemplate an interim report based on half-baked information. Finality is attached to that report which records findings of facts based on investigation and not an *ad hoc,* tentative and *prima facie* view based on no G investigation or cursory investigation. The State of Karnataka, therefore, contends that since the interim order was not preceded by an investigation of the type contemplated by the Act, the said order of 25th June, 1991 could not be described as 'a report' or 'a decision' under section 5(2) of the Act and hence there could be no question of publishing it in the gazette. It is, therefore, contended that no finality can attach to such an H order which is neither a report nor a decision and even if published in the

gazette it cannot bind the parties to the dispute and can have no efficacy in law. On Question 2(ii), it is, therefore, contended that since there was no investigation, no findings on facts, no report and no decision, the Central Government is under no obligation to publish the interim order of the Tribunal.

With reference to Question 3, the State of Karnataka reiterates that the scheme of the Act clearly envisages a final report to be given by the Tribunal on conclusion of the investigation and after the Tribunal has reached firm conclusions on disputed questions of fact raised before it by the contesting parties. It is only thereafter that it can in its report record its decision which on being gazetted becomes final and binding on the parties. The words 'any matter appearing to be connected with or relevant to water dispute' employed in section 5(1) of the Act, do not contemplate reference of an interim relief matter nor can the same empower the Tribunal to make an interim order *pendente lite*. The Act has deliberately not conferred any power on the Tribunal to make an interim order for the simple reason that a water dispute has many ramifications, social, economic and political, and involves questions of equitable distribution of water which cannot be done without a full-fledged investigation of the relevant data-material including statistical information. In the very nature of things, therefore, it is impossible to think that the Act envisaged the making of an interim order. While conceding that certain kinds of interlocutory orders which are processual in nature can be made by the Tribunal to effectuate the purpose of the Act, namely, adjudication of a water dispute, no interim relief or order can be granted which will affect the existing rights of the parties because that would in effect deprive the concerned State of the power to legislate in respect of water under Entry 17 and/or make executive orders in that behalf under Article 162 of the Constitution. The jurisdiction conferred on the Tribunal under the Act to adjudicate upon a water dispute does not extend to grant of interim relief. The State of Karnataka, therefore, contends that having regard to the purpose, scope and intendment of the Act, the Tribunal constituted thereunder has no power or authority to grant any interim relief which would have the effect of adversely interfering with its existing rights, although while finally adjudicating the dispute it can override any executive or legislative action taken by the State. Since the allocation of flow waters between the concerned States is generally based on the principle of 'equitable apportionment', it is incumbent on the Tribunal to investigate the facts and all relevant materials before deciding on the shares of the concerned States which is not possible at the interim stage and hence the legislature has advisedly not conferred any power on the Tribunal to make an interim order affecting the existing rights of the concerned parties. The

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A State of Karnataka, therefore, urges that this question deserves to be answered in the negative.

The State of Kerala has in its written submissions of 10th August, 1991 by and large supported the stand taken by the State of Karnataka. It contends that the provisions of the Act enacted under Article 262 of the B Constitution constitute a complete Code and the Tribunal has been conferred the powers of a civil court under the Civil Procedure Code only in respect of matters enumerated in section 9(1) of the Act. The power to grant interim relief is conspicuously absent and in the absence of an express provision in this behalf, the Tribunal, which is a creation of the Act, can have no jurisdiction to grant interim relief. It would be advanta- C geous to state the contention of the State of Kerala in its own words:

> ".....Tribunal has no jurisdiction or power to make an interim award or grant any interim relief to a party unless the dispute relating to the interim relief has itself been referred to the Tribunal." (Paragraph 1.5)

D This is further amplified in paragraph 3.3 of its submissions as under.:

> "Such a relief can be granted to a party if that forms the subject matter of a separate reference to the Tribunal by the Central Government. In such a situation, the order of the Tri- E bunal, would constitute a separate report and decision within section 5(2) of the Act which would then be published by the Central Government and would, therefore, be binding on the parties."

It is, however, the stand of Kerala that no specific reference for grant of F interim relief was made to the Tribunal and hence the interim order of 25th June, 1991 does not constitute a report and a decision within the meaning of section 5(2) and hence the Central Government is not expected to gazette the same. Unless the same is gazetted finality cannot attach to it nor can it bind the parties. Therefore, contends the State of Kerala, the Tribunal had no jurisdiction to grant interim relief which it has G granted by its aforesaid interim order. Hence the said order has no efficacy in law and can be ignored.

On the question of issuance of the Ordinance, the State of Kerala contends, that such a legislation falls within the scope and ambit of Entry 17 and is, therefore, perfectly legal and constitutional and is not in any H manner inconsistent with Entry 56 nor does it trench upon any part of the

declaration in section 2 of the River Boards Act or any of the provisions thereof. Thus according to Kerala, the legislative competence to pass such a statute vests in the State legislature under Entry 17 and, therefore, the Governor of Karnataka was competent to issue the Ordinance under Article 213 of the Constitution.

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However, in the course of his submissions before this Court, Mr. Shanti Bhushan, counsel for the State of Kerala departed from the stand taken in the written submission and contended that the scheme of the Act does not confer any power whatsoever on the Tribunal to make an interim order and, therefore, the only remedy available to a State which apprehends any action by the upper riparian State likely to adversely affect its right, i.e. the rights of its people, is to move the Supreme Court under Article 131 of the Constitution notwithstanding the provisions of Article 262 and section 11 of the Act. According to the learned counsel since the scope of Article 262 read with the scheme of the Act does not contemplate a Reference regarding the grant of interim relief to the Tribunal constituted under the Act, the field is left open for a suit to be instituted under Article 131 of the Constitution. Mr. Shanti Bhushan went so far as to contend that even if the Act had invested power in the Central Government such a provision would have been hit by Article 262 itself as the scope of that Article is limited while Article 131 is wider in scope. Thus, according to counsel, this Court's majority view expressed by Kasliwal, J. in Civil Appeals Nos. 303, 304 & 2036 of 1991 which held that there was a reference to the Tribunal for grant of interim relief is not consistent with the true meaning and sope of Article 262 and the provisions of the Act and this Court should not feel bound by it if it agrees with counsel's interpretation for to do so would be to render wrong advice to the President. It is thus manifest that counsel's submissions are a clear departure from the written submission filed by the State on 10th August, 1991.

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The State of Tamil Nadu contends that ordinarily a dispute between (i) the Government of India and one or more States or (ii) between the Government of India and any State or States on one side and one or more other States on the other or (iii) between two or more States would be governed by Article 131 of the Constitution and, subject to the provisions of the Constitution, the Supreme Court alone would have jurisdiction if and insofar as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. Article 131 begins with the words 'subject to the provisions of the Constitution' and hence it must be read subject to Article 262 of the Constitution. Article 262 enables Parliament to provide by law for the adjudication of any dispute or complaint with respect to the use, distribution or control of the

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A waters of, or in, any inter-State river or river valley. That law may, notwithstanding anything contained in the Constitution, provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to above. In exercise of power conferred by this provision., the Parliament enacted the Act and by section 11 provided as under :

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> "Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act."

C While Article 262(2) begins with the words 'notwithstanding anything in this constitution', section 11 begins with the words 'Notwithstanding anything contained in any other law' which conveys that all courts including the Supreme Court are debarred from exercising jurisdiction in respect of any water dispute which may be referred to the tribunal for adjudication.

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It is, therefore, contended that the Tribunal required to perform a purely judicial function which but for Article 262 and section 11 of the Act would have been performed by a Court of law. An independent high level machinery consisting of a Chairman and two other members nominated by the Chief Justice of India from amongst sitting Judges of the E Supreme Court or of a High Court is to constitute the Tribunal for adjudicating the water dispute. As the Tribunal is invested with the State's judicial function it has all the trappings of a civil court and it is inconceivable that such a high powered judicial body would not be empowered to make interim orders or grant interim relief, particularly when it is empowered even to override an existing legislation or interfere with a future F legislation. Since the Tribunal is a substitute for the Supreme Court (but for Article 262 and section 11 of the Act, Article 131 would have applied) it is reasonable to infer that all the powers which the Supreme Court under Article 131 can be exercised by the Tribunal while adjudicating a water dispute and, therefore, the power to grant interim relief inheres in such a Tribunal without the need for an express provision in that behalf. A Tribu- G nal on which is conferred a jurisdiction to adjudicate as to the prejudicial effect of a future legislation or executive action must of necessity possess the power to make interim orders interdicting a prejudicial act. The State of Tamil Nadu, therefore, contends that a high powered Tribunal like the present one which is a substitute for this Court must be presumed to have jurisdiction to grant an appropriate interim relief. Such an ancillary and H incidental power always inheres in a Tribunal which discharges judicial

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functions. It is, therefore, contended that Question 3 must be answered in the affirmative.

Without prejudice to the generality of the above submission, the State of Tamil Nadu contends that insofar as the question of jurisdiction to grant interim relief concerning the Cauvery water dispute is concerned, the decision of this Court dated 26th April, 1991 in Civil Appeals Nos. 303, 304 and 2036 of 1991 operates as *res judicata* and is binding on the contesting parties regardless of the view that this Court may take on the generality of the question referred for decision. It must be recalled that this Court in its judgment of 26th April, 1991 came to the conclusion that the reference made to the Tribunal included the question of grant of interim relief and this conclusion based on the interpretation of the terms of the reference dated 2nd June, 1990 read with letter dated 6th July, 1991 was clearly binding on the concerned parties and the Tribunal's interim order on the merits of the matter made in pursuance of this Court's directive to decide on merits is equally binding and cannot be disturbed in proceedings arising out of a Reference under Article 143 (1) of the Constitution. If the question of grant of interim relief forms part of the Reference, the Tribunal is duty bound to decide the same and such decision would constitute a report under Section 5(2) of the Act which the Central Government would be duty bound to publish as required by section 6 of the Act. It is further contended that in the view of the State of Tamil Nadu a Tribunal constituted under the Act has inherent jurisdiction to grant interim relief as pointed out earlier, whether or not the question regarding grant of interim relief is specifically referred, and its decision thereon would constitute a report under section 5(2) of the Act liable to be published in the official Gazette as required by section 6 thereof. If there is any ambiguity in the interim order the same can be taken care of under section 5(3) of the Act. The State of Tamil Nadu, therefore, contends that both parts of Question 2 deserve to be answered in the affirmative.

So far as Question 1 of the Reference is concerned, the State of Tamil Nadu contends that the Karnataka Ordinance (now Act) is *ultra vires* the Constitution for diverse reasons. It is contended that the real object and purpose of the legislation is to unilaterally nullify the Tribunal's interim order after having failed in the first round of litigation. It is contended that the State of Karnataka had and has no right to unilaterally decide the quantum of water it will appropriate or the extent to which it will diminish the flow of Cauvery waters to the State of Tamil Nadu and thereby deny to the people of Tamil Nadu their rightful share in the Cauvery waters. The right to just and reasonable use of water being a matter for adjudication by the Tribunal, no single State can by the use of

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its legislative power arrogate upto itself the judicial function of equitable apportionment and decide for itself the quantum of water it will use from the inter-State river regardless of the prejudice it would cause to the other State by its unilateral action. Such a power cannot be read in entry 17 as it will be destructive of the principle that such water disputes are justiciable and must be left for adjudication by an independent and impartial special forum to which it is referred, namely, the Tribunal constituted for resolving the dispute, and not by unilateral executive or legislative interference. It is, therefore, contended that the object of the legislation not being *bona fide*, the same cannot be allowed to stand as it has the effect of overruling a judicial order passed by a Tribunal specially appointed to adjudicate on the water dispute between the parties thereto.

On the question of legislative competence, the State of Tamil Nadu contends that the statute is *ultra vires* the Constitution for the following reasons:

(a) the Ordinance (now Act) is *ultra vires* the Constitution as it seeks to override or neutralise the law enacted by Parliament in exercise of power conferred by Article 262 (and not Article 246 read with the relevant entry in the Seventh Sechedule) of the Constitution. A State Legislature can have no power to legislate with regard to a water dispute as it would be incongruous to confer or infer such power in a State legislature to destroy what a judicial body has done under a Central law;

(b) the impugned legislation purporting to be under Entry 17 of List II has extra-territorial operation, in that, it directly impinges on the rights of the people of Tamil Nadu to the use of Cauvery waters.

(c) the impugned legislation is contrary to the Rule of Law and a power not comprehended even by Article 262 cannot be read into the legislative power of the State for it would pervert the basic concept of justice, and

(d) the impugned legislation is violative of the fundamental rights of the inhabitants of Tamil Nadu guranteed by Articles 14 and 21 of the Constitution, in that, the action of Karnataka is wholly arbitrary and in total disregard of the right to life of those inhabitants in Tamil Nadu who survive on Cauvery waters.

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The State of Tamil Nadu strongly contends that in a civilised society governed by the Rule of Law, a party to a 'lis'-water dispute-cannot be allowed to arrogate to itself the right to decide on the dispute or to nullify an interim order made by a Tribunal in obedience to the decision of the apex court by abusing the legislative power under Entry 17 under which the impugned legislation purports to be.

Without raising any preliminary objection and without prejudice to its afore-mentioned contentions, the State of Tamil Nadu contends that the jurisdiction of this Court under Article 143 of the Constitution is discretionary and this Court should refrain from answering a Reference which is in general terms without background facts and is likely to entail a roving inquiry which may ultimately prove academic only. Secondly, the State of Karnataka has immediately after the interim order instituted a suit, being Original Suit No.1 of 1991, in this Court in which it has prayed for a declaration that the interim order of the Tribunal dated 25th June, 1991 is without jurisdiction, null and void, and for setting aside the said order. It is contended that while on the one hand the decision of this Court, per Kasliwal, J., has become final and is *res judicate* between the parties thereto, on the other hand the State of Karnataka is raking up the same question of jurisdiction before this court in a substantive suit with a view to overreaching this Court's earlier order. The Presidential Reference in terms refers to disputes and differences having arisen out of the Tribunal's interim order which, it is said, has given rise to a public controversy likely to result in undesirable consequences. Such matters, contends the State of Tamil Nadu, can be effectively countered by the concerned Government and do not call for a Presidential Reference. If there is any doubt or difficulty in the implementation of the impugned order recourse can always be had to section 5(3) of the Act. In the circumstances it is urged that this Court should refuse to answer the Reference.

The Union Territory of Pondicherry contends that the promulgation of the Ordinance (now Act) is intended to further protract the long standing water dispute which came to be referred to the Tribunal only after this Court issued a mandamus in that behalf and is likely to prejudicially affect the interest of the State as well as the farmers and other inhabitants who utilise the water from river Cauvery. It is contended that the said legislation is unconstitutional and is a piece of colourable legislation for the following reasons:

(a) the power of the State Legislature to enact a law on the subject falling in Entry 17 List II, is subject to the provisions of Entry 56 in List I, and once Parliament had made a declaration in that behalf in section 2 of the River Boards

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A Act, the State Legislature was not competent to enact the impugned law,

(b) once the Central Government had entrusted the Cauvery water dispute to an independent Tribunal under the provisions of the Act, it was not constitutionally permissible B for Karnataka to enact the impugned law,

(c) in the case of flowing water the riparian States have no ownership or proprietary right therein except in the usufruct thereof and, therefore, the power to legislate therein under Entry 17 of List II can extend to only the usufructurary right subject to the right of a riparian State to get the C customary quantity of water,

(d) the objective of the impugned legislation is to set at naught the interim order of the Tribunal and to the extent it seeks to interfere with the exercise of judicial powers it is unconstitutional, D

(e) the impugned legislation is violative of Article 21 of the Constitution as it is intended to diminish the supply of water to Tamil Nadu and Pondicherry which is also against the spirit of Articles 38 and 39 of the Constitution, and

(f) the impugned legislation seeks to eclipse the interim or- E der of the Tribunal constituted under an Act made in virtue of Article 262 of the Constitution and being in conflict with the Central legislation is void for repugnancy.

For the above reasons, Pondicherry contends that the Ordinance (now F the Act) is constitutionally invalid.

As regards Question 2 it is contended that the water dispute referred to the Tribunal comprised the issue regarding the grant of interim relief as held by Kasliwal, J. and hence the interim order made by the Tribunal constitutes a report within the meaning of section 5(2) of the Act and G consequently the Central Government is obliged to publish it is required by section 6 of the Act. Once it is so published it will operate as a decision *in rem* but even without publication it is binding on Karnataka as a decision *in personam*. If any explanation or guidance is required it can be had from the Tribunal by virtue of section 5(3) of the Act. Once the time for seeking explanation or guidance is over the law enjoins on the H Central Government the obligation to publish the report under section 6 of

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the Act. Both the elements of Question 2 must, contends Pondicherry, be answered in the affirmative. A

So far as Question 3 is concerned, it is contended that the Tribunal constituted under the Act, though not a Court, has all the attributes of a Court since it is expected to discharge a judicial function and must, therefore, be presumed to have 'incidental and ancilliary powers' to grant B interim relief, if equity so demands. That is so because the jurisdiction of all courts including this Court is taken away by virtue of section 11 of the Act read with Article 262(2) of the Constitution. The Tribunal is, therefore, required to discharge the judicial function of adjudicating a water dispute between two or more States and must, therefore, be deemed to possess the inherent power to grant interim relief which inheres in all such C judicial bodies. Absence of an express provision conferring power to grant interim relief does not detract from the view that such power inheres in a Tribunal which is called upon to discharge an essentially judicial function. For discharging such a function it is essential that the Tribunal must possess inherent power to pass interim orders from time to time in aid of adjudication. The Union Territory of Pondicherry is, therefore, of the D view that Question 3 must be answered in the affirmative.

Six intervention applications have been filed by different persons and bodies from Karnataka including the Advocate General of the State in support of the case of Karnataka raising contentions more or less similar to those raised by the State itself. One intervention application is filed by E the Tamil Nadu Society which had preferred the original Writ Petition in which a mandate to constitute a Tribunal under the Act was given. The contentions raised by the interveners are covered in the written submissions filed by the State of Tamil Nadu and need not be reiterated. The said intervener has also filed written submissions through counsel Shri Ashok Sen which we shall deal with in the course of this judgment. F

Of the three questions which have been referred to this Court under Article 143(1) of the Constitution, there can be no dispute, and indeed there was none, that question 2 arises solely and entirely out of the Tribunal's order granting interim relief. The question is whether that order constitutes a report within the meaning of section 5(2) of the Act and is G required to be published in the gazette of the Central Government to make it effective. The first question refers to the constitutional validity of the Karnataka Ordinance (now the Act). Although this question does not specifically refer to the Cauvery water dispute or the interim order passed by the Tribunal, the preamble of the said statute leaves no doubt that it is concerned with 'the protection and preservation of irrigation in irrigable H

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A areas of the Cauvery basin in Karnataka dependent on the waters of the Cauvery river and its tributaries'. The provisions of the said law extracted earlier leave no manner of doubt that the State Government has been charged with the duty to abstract or cause to be abstracted, during every water year, such quantity of water as it may deem requisite, from the flows of river Cauvery and its tributaries, 'notwithstanding anything con-
B tained in any order, report or decision of any.....Tribunal', whether made before or after the commencement of the said law, save and except a final decision under section 5(2) read with section 6 of the Act. There can, therefore, be no doubt that if the provisions of this special Karnataka enactment become legally effective, the Tribunal's order dated 25th June, 1991 granting interim relief would stand eclipsed. In that view of the
C matter Question 1 is clearly intertwined with the Cauvery water dispute referred to the Tribunal and the interim order made by that body. The third question, it was contended by Tamil Nadu and Pondicherry, though innocent in appearance and apparently general in nature, is in fact likely to nullify the interim order of the Tribunal. There can be no doubt that this Court's opinion on Question 3 will certainly have a bearing on the
D interim order of the Tribunal. Bearing this in mind we may now proceed to deal with the questions referred to this Court in the light of the submissions made at the Bar.

7. We will deal with the respective contentions with reference to each of the questions.

E

Question No. 1

To examine the validity of the contentions advanced on this question it is first necessary to analyse the relevant provisions of the Constitution.

F The distribution of legislative powers is provided for in Chapter I of Part XI of the Constitution. Article 245, *inter alia* states that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of the State may make laws for the whole or any part of the State. Article 246 provides, among other things, that subject to clauses (1)and (2) of the said Article, the
G legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in the State List in the Seventh Schedule. Clauses (1) and (2) of the said Article refer to the Parliament's exclusive powers to make laws with respect to any of the matters enumerated in the Union List and the power of the Parliament and the legislature of the State to make laws with respect to
H any of the matters enumerated in the Concurrent List. Article 248 gives

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the Parliament exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or the State List.

Entry 56 of the Union List reads as follows:

> "Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

A reading of this Entry shows that so far as inter-State rivers and river valleys are concerned, their regulation and development can be taken over by the Union by a Parliamentary enactment. However, that enactment must declare that such regulation and development under the control of the Union is expedient in the public interest.

Entry 17 in the State List reads as follows:

> "Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I."

An examination of both the Entries shows that the State has competence to legislate with respect to all aspect of water including water flowing through inter-State rivers, subject to certain limitations, viz. the control over the regulation and development of the inter-State river waters should not have been taken over by the Union and secondly, the State cannot pass legislation with respect to or affecting any aspect of the waters beyond its territory. The competence of the State legislature in respect of inter-State river waters is, however, denuded by the Parliamentary legislation only to the extent to which the latter legislation occupies the field and no more, and only if the Parliamentary legislation in question declares that the control of the regulation and development of the inter-State rivers and river valleys is expedient in the public interest, and not otherwise. In other words, if a legislation is made which fails to make the said declaration it would not affect the powers of the State to make legislation in respect of inter-State river water under Entry 17.

Entry 14 of List II relates, among other things, to agriculture. In so far as agriculture depends upon water including river water, the State legislature while enacting legislation with regard to agriculture may be competent to provide for the regulation and development of its water resources including water supplies, irrigation and canals, drainage and embankments, water storage and water power which are the subjects men-

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A tioned in Entry 17. However, such a legislation enacted under Entry 14 in so far as it relates to inter-State river water and its different uses and the manners of using it, would also be, it is needless to say, subject to the provisions of Entry 56. So also Entry 18 of List II which speaks, among other things, of land improvement which may give the State Legislature the powers to enact similar legislation as under Entries 14 and 17 and
B subject to the same restrictions.

Entry 97 of the Union List is residuary and under it the Union has the power to make legislation in respect of any matter touching inter-State river water which is not enumerated in the State List or the Concurrent List. Correspondingly, the State legislature cannot legislate in relation to
C the said aspects or matters.

8. Article 131 of the Constitution deals with original jurisdiction of the Supreme Court and states as follows:-

> "131. Original Jurisdiction of the Supreme Court:- Subject to
> D the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—
>
> (a) between the Government of India and one or more States; or
>
> E (b) between the Government of India and any State or States on one side and one or more other States on the other; or
>
> (c) between two or more States,
>
> if and in so far as the dispute involves any question
> F (whether of law or fact) on which the existence or extent of a legal right depends:
>
> Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar in-
> G strument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

It is clear from the Article that this Court has original jurisdiction,
H among other things, in any dispute between two or more States where the

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dispute involves any question whether of law or fact on which the existence and extent of a legal right depends except those matters which are specifically excluded from the said jurisdiction by the proviso. However, the Parliament has also been given power by Article 262 of the Constitution to provide by law that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any dispute or complaint with respect to the use, distribution or control of the water of, or in, any inter-State river or river valley. Section 11 of the Act, namely, the Inter-State Water Disputes Act, 1956 has in terms provided for such exclusion of the jurisdiction of the courts. It reads as follows:-

> "Sec.11- Notwithstanding anything contained in any other law, neither the Supreme Court nor any other court shall have or exercise jurisdiction in respect of any water dispute which may be referred to a Tribunal under this Act."

This provision of the Act read with Article 262 thus excludes original cognizance or jurisdiction of the inter-State water dispute which may be referred to the Tribunal established under the Act, from the purview of any Court including the Supreme Court under Article 131.

9. We may now analyse the provisions of the Karnataka Ordinance in question the text of which is already reproduced. Its preamble states, that it is issued (i) to provide for the protection and preservation of irrigation in irrigable areas of the Cauvery basin in Karnataka dependent on the waters of the Cauvery river and its tributaries, and (ii) that the Governor of Karnataka was satisfied that circumstances existed which rendered it necessary for him to take immediate action for the said protection and preservation. The irrigable areas of which protection and preservation is sought by the Ordinance are mentioned in the Schedule to the Ordinance. Admittedly the Schedule includes the irrigable area as existing in 1972 during the tenure of the agreement of 1924 between Karnataka and Tamil Nadu as well as the increase in the same since 1972 till the date of the Ordinance as well as the areas which are committed to be brought under irrigation on account of some of the projects mentioned in Column II of the Schedule. Clause 3(1) of the Ordinance then makes a declaration of the duty of the State Government to protect, preserve and maintain irrigation from the waters of the Cauvery river and its tributaries in the said irrigable area. Sub-clause (2) of the said clause then gives powers to the State Government to abstract or cause to be abstracted during every water year (which is defined as the year commencing with Ist of June of a calendar year and ending with 31st May of next calendar year), such quantity of water *as it may deem requisite*, from the flows of the Cauvery river and its tributaries and *in such manner* and during *such intervals* as

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A *the State Government* or any officer not below the rank of an Engineer-in-Chief designated by it may deem fit and proper. (Emphasis supplied). This clause, therefore, vests in the State Government or the Officer designated by it, an absolute power to appropriate any quantity of water from the Cauvery river and its tributaries and in any manner and at any interval as may be deemed fit and proper. The power given by the clause is unre-
B stricted and uninhibited by any consideration save and except the protection and preservation of the irrigable area of the Karnataka State.

Clause 4 is still more absolute in its terms and operation inasmuch as it declares that the Ordinance and any rules and orders made thereunder shall have effect notwithstanding anythng contained in any Order, report
C or decision of any court or tribunal (whether made before or after the commencement of the Ordinance) save and except a final decision under the provisions of sub-Section (2) of Section 5 read with Section 6 of the Inter-State Water Disputes Act.

Clause (5) states that when any difficulty arises in giving effect to
D the provisions of this Ordinance, the State Government may, by order, as occasion requires, do anything which appears to be necessary for the purpose of removing the difficulty, and clause (6) gives power to the State Government to make rules to carry out the purpose of the Ordinance. Clauses (4), (5) and (6) read together show that the Ordinance, Rules and Order made thereunder will prevail over any order, report or decision of
E any court including the Supreme Court and, of course, of the Tribunal under the Inter-State Water Dispute Act. The only decision which is excluded from the overriding effect of the Ordinance is the final decision of the Water Disputes Tribunal given under Section 5 (2) read with Section 6 of the Inter-State Water Disputes Act.

10. The object of these provisions of the Ordinance is obvious. Coming
F close on the Order dated 25th June, 1991 of the Tribunal and in the context of the stand taken by the State of Karnataka that the Tribunal has no power or jurisdiction to pass any interim order or grant any interim relief, it is to override the said decision of the Tribunal and its implementation. The Ordinance has thus the effect of defying and nullifying any interim order of the Tribunal appointed under a law of the Parliament. This position
G is not disputed before us on behalf of the State of Karnataka. The other effect of the Ordinance is to reserve to the State of Karnataka exclusively the right to appropriate as much of the water of river Cauvery and its tributaries as it deems requisite and in a manner and at periods it deems fit and proper, although pending the final adjudication by the Tribunal.

H 11. It cannot be disputed that the Act, viz., the Inter-State Water Disputes Act, 1956 is not a legislation under Entry 56. In the first instance Entry 56

speaks of regulation and development of inter-State rivers and river valleys and does not relate to the disputes between the riparian States with regard to the same and adjudication thereof. Secondly, and even assuming that the expression "regulation and development" would in its width, include resolution of disputes arising therefrom and a provision for adjudicating them, the Act does not make the declaration required by Entry 56. This is obviously not an accidental omission but a deliberate disregard of the Entry since it is not applicable to the subject-matter of the legislation. Thirdly, no Entry in either of the three Lists refers specifically to the adjudication of disputes with regard to inter-State river waters.

The reason why none of the Entries in the Seventh Schedule mention the topic of adjudication of disputes relating to the inter-State river waters is not far to seek. Article 262 of the Constitution specifically provides for such adjudication. The Article appears under the heading "Disputes relating to Waters", and reads as follows:

> "262. Adjudication of disputes relating to waters of inter-State rivers or river valleys.-
> *
>
> (1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.
>
> (2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1)."

An analysis of the Article shows that an exclusive power is given to the Parliament to enact a law providing for the adjudication of such disputes. The disputes or complaints for which adjudication may be provided relate to the "use, distribution or control" of the waters of, or in any inter-State river or river valley. The words "use", "distribution" and "control" are of wide import and may include regulation and development of the said waters. The provisions clearly indicate the amplitude of the scope of adjudication inasmuch as it would take within its sweep the determination of the extent, and the manner, of the use of the said waters, and the power to give directions in respect of the same. The language of the Article has, further to be distinguished from that of Entry 56 and Entry 17. Whereas Article 262 (1) speaks of *adjudication of any dispute or complaint* and that too with respect to the use, *distribution or control of the waters* of or

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A in any inter-State river or river valleys, Entry 56 speaks of *regulation and development* of inter-State *rivers and river valley*. Thus the distinction between Article 262 and Entry 56 is that whereas former speaks of *adjudication* of disputes with respect to use, distribution or control of the *waters* of any inter-State river or river valley, Entry 56 speaks of regulation and development of inter-State *rivers and river valleys*. (Emphasis supplied). B Entry 17 likewise speaks of *water*, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56. It does not speak either of adjudication of disputes or of an inter-State river as a whole as indeed it cannot, for a State can only deal with water within its territory. It is necessary to bear in mind these distinctions between Article 262, Entry 56 and Entry C 17 as the arguments and counter-arguments on the validity of the Ordinance have a bearing on them.

12. We have already pointed out another important aspect of Article 262, viz., Clause (2) of the Article provides that notwithstanding any other provision in the Constitution, Parliament may by law exclude the jurisdic- D tion of any court including the Supreme Court in respect of any dispute or complaint for the adjudication of which the provision is made in such law. We have also noted that Section 11 of the Inter-State Water Disputes Act makes such a provision.

13. The said Act, as its preamble shows, is an Act to provide for the E "adjudication of disputes relating to waters of inter-State rivers and river valleys". Clause (c) of Section 2 of the Act defines "water dispute" as follows:

> "2. In this Act, unless the context otherwise requires,-
>
> F (a) .....
>
> (b) .....
>
> (c) "water dispute" means any dispute or difference between two or more State Governments with respect to
>
> G (i) the use, distribution or control of the waters of, or in, any inter-State river or river valley; or
>
> (ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or
>
> H (iii) the levy of any water rate in contravention of the prohibition contained in section 7."

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Section 3 of the Act states that if it appears to the Government of any State that the water dispute with the Government of another State of the nature stated therein, has arisen or is likely to arise, the State Government may request the Central Government to refer the water dispute to a Tribunal for adjudication. Section 4 of the Act provides for the constitution of a Tribunal when a request is received for referring the dispute to a Tribunal and the Central Government is of the opinin that the water dispute cannot be settled by negotiations. Section 5 of the Act requires the Tribunal to investigate the matter referred to it and forward to the Central Government the report of its findings and its decision. The Central Government has then to publish the decision under Section 6 of the Act which decision is final and binding on the parties to the dispute and has to be given effect to by them. These dominant provisions, among others, of the Act clearly show that apart from its title, the Act is made by the Parliament pursuant to the provisons of Article 262 of the Constitution specifically for the adjudication of the disputes between the riparian States with regard to the use, distribution or control of the waters of the inter-State rivers or river valleys. The Act is not relatable to Entry 56 and, therefore, does not cover either the field occupied by Entry 56 or by Entry 17. Since the subject of adjudication of the said disputes is taken care of specifically and exclusively by Article 262, by necessary implication the subject stands excluded from the field covered by Entries 56 and 17. It is not, therefore, premissible either for the Parliament under Entry 56 or for a State legislature under Entry 17 to enact a legislation providing for adjudication of the said disputes or in any manner affecting or interferring with the adjudication or adjudicatory process of the machinery for adjudication established by law under Article 262. This is apart from the fact that the State legislature would even otherwise be incompetent to provide for adjudication or to affect in any manner the adjudicatory process or the adjudication made in respect of the inter-State river waters beyond its territory or with regard to disputes between itself and another State relating to the use, distribution or control of such waters. Any such act on its part will be extra-territorial in nature and, therefore, beyond its competence.

14. Shri Venugopal has in this connection urged that it is Entry 97 of the Union List which deals with the topic of the use, distribution and control of waters of an inter-State river. The use, distribution and control of the waters of such rivers, by itself is not a topic which is covered by Article 262. It is also, according to him, not a topic covered by Entry 56 which only speaks of *regulation and development* of inter-State *rivers* and *river valleys* meaning thereby the entirety of the rivers and river valleys and not the waters at or in a particular place (emphasis supplied). Further, the regulation and development, according to him, has nothing to do with the

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A use, distribution or allocation of the waters of the inter-State river between different riparian States. That topic should, therefore, be deemed to have been covered by the said residuary Entry 97.

With respect to the learned counsel, it is not possible to accept this interpretation of the Entry 97. This is so firstly because, according to us, B the expression "regulation and development of Inter-State rivers and river valleys" in Entry 56 would include the use, distribution and allocation of the waters of the inter-State rivers and river valleys between different riparian States. Otherwise the intention of the Constituent Assembly to provide for the Union to take over the regulation and development under its control makes no sense and serves no purpose. What is further, the C River Boards Act, 1956 which is admittedly enacted under Entry 56 for the regulation and development of inter-State rivers and river valleys does cover the field of the use, distribution and allocation of the waters of the inter-State rivers and river valleys. This shows that the expression "regulation and development" of the inter-State rivers and river valleys in Entry 56 has legislatively also been construed to include the use, distribution or D allocation of the waters of the inter-State rivers and river valleys between riparian States. We are also of the view that to contain the operation of Entry 17 to the waters of an inter-State river and river valleys within the boundaries of a State and to deny the competence to the State legislature to interfere with or to affect or to extend to the use, distribution and allocation of the waters of such river or river valley beyond its territory, E directly or indirectly, it is not necessary to fall back on the residuary Entry 97 as an appropriate declaration under Entry 56 would suffice. The very basis of a federal Constitution like ours mandates such interpretation and would not bear an interpretation to the contrary which will destory the constitutional scheme and the Constitution itself. Although, therefore, it is possible technically to separate the "regulation and development" of the F inter-State river and river valley from the "use, distribution and allocation" of its water, it is neither warranted nor necessary to do so.

The above analysis of the relevant legal provisions dealing with the inter-State rivers and river valleys and their waters shows that the Act, viz., the Inter-State Water Disputes Act, 1956 can be enacted and has G been enacted only under Article 262 of the Constitution. It has not been enacted under Entry 56 as it relates to the adjudication of the disputes and with no other aspect either of the inter-State river as a whole or of the waters in it.

15. It will be pertinent at this stage also to note the true legal position H about the inter-State river water and the rights of the riparian States to the

same. In *State of Kansas* v. *State of Colorado,* [206] US 46 the Supreme Court of the United States has in this connection observed as follows: A

> "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others and is bound to yield its own view to none". B

> ".....the action of one State reaches, through the agency of natural laws into the territory of another State, the question of the extent and the limitation of the rights of the two States becomes a matter of justiciable dispute between them ..... this court is called upon to settle that dispute in such a way as will recognise the equal rights of both and at the same time establish justice between them". C

> "The dispute is of a justiciable nature to be adjudicated by the Tribunal and is not a matter for legislative jurisdiction of one State...". D

> "The right to flowing water is now well settled to be a right incident to property in the land; it is a right publici juris, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence, each proprietor has a E right to a just and reasonable use of it, as it passes through his land, and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down".

F

> "The right to the use of the flowing water is publici juris, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water subject to a similar right in all the proprietors to the reasonable enjoyment G of the same gift of providence. It is therefore only for an abstraction and deprivation of this common benefit or for an unreasonable and unauthorised use of it that an action will lie."

16. Though the waters of an inter-State river pass through the territories H of the riparian States such waters cannot be said to be located in any one

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A State. They are in a state of flow and no State can claim exclusive ownership of such waters so as to deprive the other States of their equitable share. Hence in respect of such waters, no State can effectively legislate for the use of such waters since its legislative power does not extend beyond its territories. It is further an acknowledged principle of distribution and allocation of waters between the riparian States that the same has
B to be done on the basis of the equitable share of each State. What the equitable share will be will depend upon the facts of each case. It is against the background of these principles and the provisions of law we have already discussed that we have to examine the respective contentions of the parties.

C 17. The Ordinance is unconstitutional because it affects the jurisdiction of the Tribunal appointed under the Central Act, viz., the Inter-State Water Disputes Act which legislation has been made under Article 262 of the Constitution. As has been pointed out above, while analysing the provisions of the Ordinance, its obvious purpose is to nullify the effect of the interim order passed by the Tribunal on 25th June, 1991. The Ordinance
D makes no secret of the said fact and the written statement filed and the submissions made on behalf of the State of Karnataka show that since according to the State of Karnataka the Tribunal has no power to pass any interim order or grant any interim relief as it has done by the order of 25th June, 1991, the order is without jurisdiction and, therefore, void *ab initio*. This being so, it is not a decision, according to Karnataka, within the
E meaning of Section 6 and not binding on it and in order to protect itself against the possible effects of the said order, the Ordinance has been issued. The State of Karnataka has thus arrogated to itself the power to decide unilaterally whether the Tribunal has jurisdiction to pass the interim order or not and whether the order is binding on it or not. Secondly, the State has also presumed that till a final order is passed by the Tribu-
F nal, the State has the power to appropriate the waters of the river Cauvery to itself unmindful of and unconcerned with the consequences of such action on the lower riparian States. Karnataka has thus presumed that it has superior rights over the said waters and it can deal with them in any manner. In the process, the State of Karnataka has also presumed that the lower ripar in States have no equitable rights and it is the sole judge as to
G the share of the other riparian States in the said waters. What is further, the State of Karnataka has assumed the role of a judge in its own cause. Thus, apart from the fact that the Ordinance directly nullifies the decision of the Tribunal dated 25th June, 1991, it also challenges the decision dated 26th April, 1991 of this Court which has ruled that the Tribunal had power to consider the question of granting interim relief since it was
H specifically referred to it. The Ordinance further has an extra-territorial

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operation insasmuch as it interferes with the equitable rights of Tamil Nadu and Pondicherry to the waters of the Cauvery river. To the extent that the Ordinance interferes with the decision of this Court and of the Tribunal appointed under the Central legislation, it is clearly unconstitutional being not only in direct conflict with the provisions of Article 262 of the Constitution under which the said enactment is made but being also in conflict with the judicial power of the State.

In this connection, we may refer to a decision of this Court in *Municipal Corporation of the City of Ahmedabad etc.* v. *New Shorock Spg. & Wvg. Co., Ltd. etc.*, [1971] 1 SCR 288. The facts in this case were that the High Court as well as this Court had held that property tax collected for certain years by the Ahmedabad Municipal Corporation was illegal. In order to nullify the effect of the decision, the State Government introduced Section 152A by amendment to the Bombay Provincial Municipal Corporation Act the effect of which was to command the Municipal Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. This Court held that the said provision makes a direct in road into the judicial powers of the State. The legislatures under the Constitution have, within the prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of those powers a legislature can remove the basis of a decision rendered by a competent court thereby rendering the decision ineffective. But no legislature in the country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts. Consequently, the provisions of sub-section (3) of section 152A were held repugnant to the Constitution and were struck down. To the same effect is another decision of this court in *Madan Mohan Pathak* v. *Union of India & Ors. etc.*, [1978] 3 SCR 334. In this case a settlement arrived at between the Life Insurance Corporation and its employees had become the basis of a decision of the High Court of Calcutta. This settlement was sought to be scuttled by the Corporation on the ground that they had received instructions from the Central Government that no payment of bonus should be made by the Corporation to its employees without getting the same cleared by the Government. The employees, therefore, moved the High Court, and the High Court allowed the petition. Against that, a Letters Patent Appeal was filed and while it was pending, the Parliament passed the Life Insurance Corporation (Modification of Settlement) Act, 1976 the effect of which was to deprive the employees of bonus payable to them in accordance with the terms of the settlement and the decision of the Single Judge of the High Court. On this amendment of the Act, the Corporation withdrew its appeal and refused to pay the bonus. The employees having approached this Court challenging the constitutional validity of the said

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A legislation, the Court held that it would be unfair to adopt legislative procedure to undo a settlement which had become the basis of a decision of the High Court. Even if legislation can remove the basis of a decision, it has to do it by alteration of general rights of class but not by simply excluding the specific settlement which had been held to be valid and enforceable by a High Court. The object of the Act was in effect to take B away the force of the judgment of the High Court. The rights under the judgment would be said to arise independently of Article 19 of the Constitution.

Yet another decision of this Court on the point is *P. Sambamurthy & Ors. etc. etc.* v. *State of Andhra Pradesh & Anr.*, [1987] 1 SCR 879. In C this case what was called in question was the insertion of Article 371-D of the Constitution. Clause (5) of the Article provided that the order of the Administrative Tribunal finally disposing of the case would become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order was made, whichever was earlier. The proviso to the clause provided that the State Government may D by special order made in writing for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it became effective and in such a case the order of the Tribunal shall have effect only in such modified form or be of no effect. This court held that it is a basic principle of the rule of law that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but E must also be in accordance with law, and the power of judicial review is conferred by the constitution with a view to ensuring that the law is observed and there is compliance with the requirement of the law on the part of the executive and other authorities. It is through the power of judicial review conferred on an independent institutional authority such as the High Court that the rule of law is maintained and every organ of the F State is kept within the limits of the law. If the exercise of the power of judicial review can be set at naught by the State Government by overriding the decision given against it, it would sound the death-knell of the rule of law. The rule of law would be meaningless as it would be open to the State Government to defy the law and yet get away with it. The proviso to cl. (5) of Art. 371-D was therefore, violative of the basic G structure doctrine.

The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter- H parties and affect their rights and liabilities alone. Such an act on the part

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of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or Tribunal.

The effect of the provisions of section 11 of the present Act, viz., the Inter-State Water Disputes Act read with Article 262 of the Constitution is that the entire judicial power of the State and, therefore, of the courts including that of the Supreme Court to adjudicate upon original dispute or complaint with respect to the use, distribution or control of the water of, or in any inter-State river or river valleys has been vested in the Tribunal appointed under Section 4 of the said Act. It is, therefore, not possible to accept the submission that the question of grant of interim relief falls outside the purview of the said provisions and can be agitated under Article 131 of the Constitution. Hence any executive order or a legislative enactment of a State which interferes with the adjudicatory process and adjudication by such Tribunal is an interference with the judicial power of the State. In view of the fact that the Ordinance in question seeks directly to nullify the order of the Tribunal passed on 25th June, 1991, it impinges upon the judicial power of the State and is, therefore, *ultra vires* the Constitution.

Further, admittedly, the effect of the Ordinance is to affect the flow of the waters of the river Cauvery into the territory of Tamil Nadu and Pondicherry which are the lower riparian States. The Ordinance has, therefore, an extra-territorial operation. Hence the Ordinance is on that account beyond the legislative competence of the State and is *ultra vires* the provisions of Article 245 (1) of the Constitution.

The Ordiance is also against the basic tenets of the rule of law inasmuch as the State of Karnataka by issuing the Ordinance has sought to take law in its own hand and to be above the law. Such an act is an invitation to lawlessness and anarchy, inasmuch as the Ordinance is a manifestation of a desire on the part of the State to be a judge in its own cause and to defy the decisions of the judicial authorities. The action forebodes evil consequences to the federal structure under the Constitution and opens doors for each State to act in the way it desires disregarding not only the rights of the other States, the orders passed by instrumentalities constituted under an Act of Parliament but also the provisions of the Constitution. If the power of a State to issue such an Ordinance is upheld it will lead to the break down of the Constitutional mechanism and affect the unity and integrity of the nation.

18. In view of our findings as above on the unconstitutionality of the Ordinance, it is not necessary for us to deal with the contention advanced

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A on behalf of Tamil Nadu and Pondicherry that the Ordinance is unconstitutional also because it is repugnant to the provisions of the River Boards Act, 1956 which is admittedly enacted under Entry 56.

19. We also do not propose to deal with the contentions advanced on behalf of both sides with reference to Articles 19 (1) (g) and 21 of the B Constitution. On behalf of Karnataka the said Articles are invoked to support the Ordinance contending that the Ordinance has been issued to protect the fundamental rights of its inhabitants guaranteed to them by the said Articles which rights were otherwise been denied by the Tribunals' order of 25th June, 1991. As against it, it was contended on behalf of Tamil Nadu that it was the Ordinance which was designed to deny to its C inhabitants the said rights. Underlying the contentions of both is the presumption that the Tribunal's order denies to Karnataka and ensures to Tamil Nadu the equitable share in the river water. To deal with the said contentions is, therefore, to deal with the factual merits of the said order which it is not for us to examine. Of the same genre are the contentions advanced on behalf of Karnataka, viz., that the order creats new rights in D favour of Tamil Nadu and leads to inequitable consequences so far as Karnataka is concerned. For the same reasons, we cannot deal with these contentions either.

Question No. 3 :

E 20. Question 3 is intimately connected with Question 2. However, Question 3 itself has to be answered in two parts, viz., whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief (i) when no reference for grant of interim relief is made to the Tribunal, and (ii) when such reference is made to it. It was contended on behalf of Karnataka and Kerala that the answer to the second part of the F question will also depend upon the answer to the first part. For if the Tribunal has no power to grant interim relief, the Central Government would be incompetent to make a reference for the purpose and the Tribunal in turn will have no jurisdiction to entertain such reference, even if made. And if the Tribunal has no power to grant interim relief, then the order made by the tribunal will not constitute a report and a decision G within the meaning of Section 5 (2) and hence it would not be required to be published by the Central Government under Section 6 of the Act in order to make it effective. Further if the Tribunal has no such power to grant interim relief then the order passed by the Tribunal on 25th June, 1991 will be void being without jurisdiction and, therefore, to that extent the Ordinance issued by the State of Karnataka will not be in conflict with H the provisions of the Act, viz., the Inter-State Water Disputes Act, 1956.

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21. This Court by its decision of April 26, 1991 has held, as pointed out above, that the Central Government had made a reference to the Tribunal for the consideration of the claim for interim relief prayed for by the State of Tamil Nadu and hence the Tribunal had jurisdiction to consider the said request being a part of the Reference itself. Implicit in the said decision is the finding that the subject of interim relief is a matter connected with or relevant to the water dispute within the meaning of Section 5 (1) of the Act. Hence the Central Government could refer the matter of granting interim relief to the Tribunal for adjudication. Although this Court by the said decision has kept open the question, viz., whether the Tribunal has incidental, ancillary, inherent or implied power to grant the interim relief when no reference for grant of such relief is made to it, it has in terms concluded the second part of the question. We cannot, therefore, countenance a situation whereby Question 3 and for that matter Questions 1 and 2 may be so construed as to invite our opinion on the said decision of this Court. That would obviously be tantamount to our sitting in appeal on the said decision which it is impermissible for us to do even in adjudicatory jurisdiction. Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution.

Shri Nariman, however, contended that the President can refer any question of law under Article 143 and, therefore, also ask this Court to reconsider any of its decisions. For this purpose, he relied upon the language of clause (1) of Article 143 which is as follows:

> **"143. Power of president to consult Supreme Court—** (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon."

In support of his contention he also referred us to the opinion expressed by this Court in *re: The Delhi Laws Act, 1912, The Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950* [1951] SCR 747. For the reasons which follow, we are unable to accept this contention. In the first instance, the language of clause (1) of Article 143 far from supporting Shri Nariman's contention is opposed to it. The said clause empowers the President to refer for this Court's opinion a question of law or fact which has arisen or is likely to arise. When this

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A Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is *res integra* so as to require the President to know what the true position of law on the question is. The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when B this Court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule I of Order XL of the Supreme Court Rules 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent C power and only in exceptional circumstances such as when the earlier decision is *per incuriam* or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. See: *The Bengal Immunity Company Ltd.* v. *The State of Bihar & Ors.*, [1955] 2 SCR 603. Under the Constitution such appellate jurisdiction does not vest in this Court; nor can it be vested in it by the President D under Article 143. To accept Shri Nariman's contention would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary.

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So far as the opinion expressed by this Court *in re The Delhi Laws Act, 1912* (supra) is concerned, as the Reference itself makes clear, what was referred was a doubt expressed by the President on the decision of the Federal Court in *Jatindra Nath Gupta* v. *The Province of Bihar & Ors.*, [1949] FCR 595 which was delivered on 20th May, 1949. The Federal F Court at that time was not the apex court. Upto 10th October, 1949, the appeals from its decisions lay to the Privy Council including the appeal from the decision in question. The decisions of the Federal Court were not binding on the Supreme Court as held in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque & Ors.*, [1955] 1 SCR 1104. Hence it was not a case where the President had referred to this Court for its opinion a decision G which had become a law of the land. Hence the case in *re The Delhi Laws Act, 1912* (supra) does not support the contention.

The provisions of clause (2) of Article 374 of the Constitution also do not help Shri Nariman's contention since the said provisions relate to the transitional period and the "judgments and orders of the Federal Court" H referred to therein are obviously the interim judgments and orders in the

suits, appeals and proceedings pending in the Federal Court at the commencement of the Constitution and which stood transferred to the Supreme Court thereafter. This is also the view taken by a Division Bench of Bombay High Court in *State of Bombay* v. *Gajanan Mahadev Badley,* AIR [1954] Bombay 351. This view has been confirmed by this Court in *Delhi Judicial Service Association, Tis Hazari Court, Delhi etc.* v. *State of Gujrat & Ors. etc.* JT 1991 (3) SC 617. Paragraphs 32 to 37 of the judgment deal with this subject specifically.

22. Both Shri Parasaran and Shri Venugopal requested us not to answer the first part of Question 3 on the ground that the said part of the question is purely theoretical and general in nature, and any answer given would be academic because there will be no occasion to make any further interim order or grant another interim relief in this Reference. According to him, the recitals of the order of Reference have bearing only on Questions 1 and 2, and the second part of Question 3. They have no bearing on the first part of Question 3 and since the Reference has been made in the context of particular facts which have no connection with the theoretical part of Question 3, the same should be returned unanswered as being factually unwarranted.

23. On behalf of karnataka and Kerala, however as pointed out above, it was urged that we should answer the said part of the question for the reasons stated there. Shri Shanti Bhushan in this connection relied upon the decision of this Court in *A.R. Antulay* v. *R.S. Nayak & Anr,.* [1988] Suppl. 1 SCR 1. He pointed out that by the said decision the directions given by this Court in its earlier decision were held to be void being without jurisdiction and the same were quashed. In view of this precedent, he submitted that a similar course is open to this Court and the decision dated April 26,1991 given by this Court may also be declared as being without jurisdiction and void. In *A.R. Antulay's* case (supra) two questions were specifically raised, viz., (i) whether the directions given by this Court in *R.S. Nayak* v. *A.R. Antulay,* [1984] 2 SCR 495, (hereinafter referred to as *'R.S Nayak's* case') withdrawing the Special Case No.24 of 1982 and Special Case No.3 of 1983 arising out of a complaint filed by a private individual pending in the court of Special Judge, Greater Bombay and transferring the same to the High Court of Bombay in breach of Section 7 (1) of the Criminal Law Amendment Act, 1952 (which mandates that the offences as in the said case shall be tried by a Special Judge only) thereby denying at least one right of appeal to the appellant, was violative of Articles 14 and 21 of the Constitution and whether such directions were at all valid or legal and, (ii) if such directions were not valid or legal, whether in view of the subsequent orders passed by this

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A Court on 17th of April, 1984 in a writ petition challenging the validity of the order and judgment of this Court in *R.S. Nayak's* case whereby this Court had dismissed the writ petition without prejudice to the right of the petitioner to approach this Court with an appropriate review petition or to file any other application which he may be entitled in law to file, the appeal filed was sustainable and the grounds of the appeal were justiciable. B The latter question was further explained by stating that the question was whether the directions given in *R.S. Nayak's* case in a proceedings inter-parties were binding even if bad in law or violative of Articles 14 and 21 of the Constitution and as such were immune from correction by this Court even though they caused prejudice and did injury. It may be stated here that the said proceedings had come before this Court by way of a C special leave petition against an order passed by the learned Judge of the High Court to whom the said case came to be assigned subsequently in pursuance of the directions given in *R.S. Nayak's* case. By the order passed by the learned judge, as many as 79 charges were framed against the appellant and it was decided not to proceed against other named co-conspirators. In the special leave petition filed to challenge the said order, D two questions which we have stated above were raised and leave was granted. This Court in that case held that (i) the directions given by this Court in *R.S. Nayak's* case were violative of the limits of jurisdiction of this Court since this Court could not confer jurisdiction on a High Court which was exclusively vested in the Special Judge under the provisions of the criminal Law Amendment Act of 1952; (ii) the said directions de-E prived the appellant of his fundamental rights guaranteed under Articles 14 and 21 of the Constitution since the appellant had been treated differently from other offenders and he was deprived of a right of appeal to the High Court; (iii) the directions were issued without observing the principle of *audi alteram partem* and (iv) the decision given was *per incuriam*. Shri Shanti Bhushan urged that since in that case this Court had quashed F its own earlier directions on the ground that the High Court had no jurisdiction to try the offence and this Court could not confer such jurisdiction on it, in the present case also the decision of the Court dated April 26, 1991 may be ignored for having proceeded on the basis that the Tribunal had jurisdiction to pass interim relief when it had no such jurisdiction.

G We are afraid that the facts in *A.R. Antulay's* case (supra) are peculiar and the decision has to be confined to those special facts. As this court has pointed out in the said decision, in the first instance, the directions which were given for withdrawing the case from the Special Judge to the High Court were without hearing the appellant. Those directions deprived the appellant of a right of appeal to the High Court and thus H were prejudicial to him. There was, therefore, a manifest breach of the

rule of *audi alteram partem.* Secondly, while giving the impugned directions, the Court had not noticed that under the said Act of 1952, the Special Judge had an exclusive jurisdiction to try the offence in question and this being a legislative provision, this court could not confer the said jurisdiction on the High Court. The Court also pointed out that to the extent that the case was withdrawn from the Special Judge and sent to the High Court, both Articles 14 and 21 were violated. The appellant was discriminated against and the appellant's right of appeal which was an aspect of Article 21 was affected. It would, thus, appear that not only the directions given by this Court were without jurisdiction but they were also *per incuriam* and in breach of the principles of natural justice. They were further violative of the appellant's fundamental rights under Articles 14 and 21 of the Constitution. None of the said defects exists in the decision of this Court dated April 26, 1991. It cannot be said that this Court had not noticed the relevant provisions of the Inter-State Water Disputes Act. The Court after perusing the relevant provisions of the Act which were undoubtedly brought to its notice, has come to the conclusion that the Tribunal had jurisdiction to grant interim relief when the question of granting interim relief formed part of the Reference. There is further no violation of any of the principles of natural justice or of any provision of the Constitution. The decision also does not transgress the limits of the jurisdiction of this Court. We are, therefore, of the view that the decision being inter-parties operates as *res judicata* on the said point and it cannot be reopened.

24. We, however, agree with the contention that it is not necessary to answer the first part of Question 3. The context in which all the questions are referred to as and the preamble of the Reference amply bear out that the questions have been raised against the background a particular set of facts. These facts have no bearing on the first part of Question 3 which is theoretical in nature. It is also legitimate to conclude that this part of the question was not prompted by the need to have a theoretical answer to comprehend situations in general. Our answer to the second part of the question should meet the exigencies of the situation.

Question No. 2 :

25. Coming now to Question 2, although the question is split into two parts, they deal with the same aspect of the subject inasmuch as the answer to the first part would automatically answer the second part of the question. This situation, like the first question, relates to the specific order of the Tribunal dated June 25, 1991. Hence, our opinion will have to be on the legal merits of the said order.

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A Sub-section (1) of Section 5 expressly empowers the Central Government to refer to the Tribunal not only the main water dispute but any matter appearing to be connected with or relevant to it. It cannot be disputed that a request for an interim relief whether in the nature of mandatory direction or prohibitory order, whether for the maintenance of *status quo* or for the grant of urgent relief or to prevent the final relief B being rendered infructuous, would be a matter connected with or relevant to the main dispute. In fact, this Court, by its said decision of April 26, 1991, has in terms held that the request of the State of Tamil Nadu for granting interim relief had been referred by the Central Government to the Tribunal and directed the Tribunal to consider the request on merits, the same being a part of the Reference. Hence the order of the Tribunal will C be a report and decision within the meaning of Section 5 (2) and would have, therefore, to be published under Section 6 of the Act in order to make it effective.

26. One of the contentions advanced in this behalf was that the Order of the Tribunal dated June 25, 1991 does not purport to be and does D not state to be a report and decision. It only states that it is an order. Secondly, the said order cannot be report and decision within the meaning of Section 5 (2) of the Act because: (i) the Tribunal can make report only after final adjudication of the dispute and there cannot be adjudication without investigation. There is no provision for interim investigation and interim finding and report; (ii) the Tribunal could not have made the E report because its own showing: (a) pleadings were not complete, parties had not yet placed on record all their documents and papers etc.; (b) there was no investigation of the matters, the investigation could have been done only after disclosure of documents followed by a detailed hearing, the evidence and arguments of the parties and judicial finding in consonance with natural justice; (c) the assessors appointed to assess on the F technical matters conducted their proceedings without consultation with the engineers of the State. Sometimes the engineers of Tamil Nadu were called for consultation in the absence of engineers of Karnataka. The summoning of documents and information by the assessors was also casual and did not conform to the principles of natural justice and fair-play. A copy of the advice given by the assessors to the members of the Tribunal G was not made available to the parties; (d) the Tribunal has stated "at this stage it would not be feasible nor reasonable to determine how to satisfy the needs of each State to the greatest possible extent with the minimum detriment to others". Such an approach is contrary to the concept of an investigation contemplated by the Act and hence no interim order for interim relief could be made on such investigation not contemplated under H the Act before making any order; (ii) it is only the decision which finds

support from the report of the Tribunal which in turn must be the result of a full and final investigation in full which is required to be published under Section 6 of the Act and not an order such as the one passed by the Tribunal. The present order is neither a decision nor an adjudication and hence cannot be published.

27. The contention that since the Order does not say that it is a report and decision and, therefore, it is not so under Section 5(2) of the Act is to say the least facetious. Either the Order is such a report and decision because of its contents or not so at all. If the contents do not show that it is such a report, it will not become one because the Order states so. As is pointed out a little later the contents of the Order clearly show that it is a report and a decision within the meaning of Section 5(2).

Some of the aforesaid submissions relate to the merits of the Order passed and its consequences rather than to the jurisdiction and the power of the Tribunal to pass the said Order. While giving our opinion on the present question, we are not concerned with the merits of the order and with the question whether there was sufficient material before the Tribunal, whether the Tribunal had supplied the copies of the advice given by the assessor to the respective parties and whether it had heard them on the same before passing the Order in question. The limited question we are required to answer is whether the order granting interim relief is a report and a decision within the meaning of Section 5(2) and is required to be published in the official Gazette under Section 6 of the Act. It is needless to observe in this connection that the scope of the investigation that a Tribunal or a court makes at the stage of passing an interim order is limited compared to that made before making the final adjudication. The extent and the nature of the investigation and the degree of satisfaction required for granting or rejecting the application for interim relief would depend upon the nature of the dispute and the circumstances in each case. No hard and fast rule can be laid down in this respect. However, no Tribunal or court is prevented or prohibited from passing interim order on the ground that it does not have at that stage all the material required to take the final decision. To read such an inhibition in the power of the Tribunal or a court is to deny to it the power to grant interim relief when Reference for such relief is made. Hence, it will have to be held that the Tribunal constituted under the Act is not prevented from passing an interim order or direction, or granting an interim relief pursuant to the reference merely because at the interim stage it has not carried out a complete investigation which is required to be done before it makes its final report and gives its final decison. It can pass interim orders on such material as according to it is appropriate to the nature of the interim order.

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28. The interim orders passed or reliefs granted by the Tribunal when they are not of purely procedural nature and have to be implemented by the parties to make them effective, are deemed to be a report and a decision within the meaning of Sections 5 (2) and 6 of the Act. The present Order of the Tribunal discusses the material on the basis of which it is made and gives a direction to the State of Karnataka to release water from its reservoirs in Karnataka so as to ensure that 205 TMC of water is available in Tamil Nadu's Mettur reservoir in a year from June to May. It makes the order effective from 1st July, 1991 and also lays down time-table to regulate the release of water from month to month. It also provides for adjustment of the supply of water during the said period. It further directs the State of Tamil Nadu to deliver 6 TMC of water for the Karaikal region of the Union Territory of Pondicherry. In addition, it directs the State of Karnataka not to increase its area under irrigation by the waters of the river Cauvery beyond the existing 11.2 lakh acres. It further declares that it will remain operative till the final adjudication of the dispute. Thus the Order is not meant to be merely declaratory in nature but is meant to be implemented and given effect to by the parties. Hence, the order in question constitutes a report and a decision within the meaning of Section 5 (2) and is required to be published by the Central Government under Section 6 of the Act in order to be binding on the parties and to make it effective.

29. The contention that Section 5 (3) of the Act cannot apply to the interim orders as it is only the final decision which is meant to undergo the second reference to the Tribunal provided for in it has no merit. If the Tribunal has, as held above, power to make an interim decision when a reference for the same is made, that decision will also attract the said provisions. The Central Government or any State Government after considering even such decision may require an explanation or guidance from the Tribunal as stated in the said provisions and such explanation and guidance may be sought within three months from the date of such decision. The Tribunal may then reconsider the decision and forward to the Central Government a further report giving such explanation or guidance as it deems fit. In such cases it is the interim decision thus reconsidered which has to be published by the Central Government under Section 6 of the Act and becomes binding and effective. We see, therefore, no reason why the provisions of Section 5(3) should prevent or incapacitate the Tribunal from passing the interim order. Once a decision, whether interim or final, is made under Section 5(2) it attracts the provisions both of sub-Section (3) of that Section as well as the provisions of Section 6 of the Act.

30. As pointed out earlier, the present Order having been made pursuant to the decision of this Court dated April 26, 1991 in C.As. Nos.303-04 of

1991 on a matter which was part of the Reference as held by this Court in the said decision, cannot but be a report and a decision under Section 5(2) and has to be published under Section 6 of the Act to make it effective and binding on the parties. This legal position of the said order is not open for doubt. To question its efficacy under the Act would be tantamount to flouting it.

31. Before concluding we may add that the question whether the opinion given by this Court on a Presidential Reference under Article 143 of the Constitution such as the present one is binding on all courts was debated before us for a considerable length of time. We are, however, of the view that we need not record our opinion on the said question firstly, because the question does not form part of the Reference and secondly, any opinion we may express on it would again be advisory in nature. We will, therefore, leave the matter where it stands. It has been held adjudicatively that the advisory opinion is entitled to due weight and respect and normally it will be followed. We feel that the said view which holds the field today may usefully continue to do so till a more opportune time.

32. Our opinion on the questions referred to us is, therefore, as follows:

Question No.1. The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 passed by the Governor of Karnataka on 25th July, 1991 (now the Act) is beyond the legislative competence of the State and is, therefore, *ultra vires* the Constitution.

Question No.2. (i) The Order of the Tribunal dated June 25, 1991 constitutes report and decision within the meaning of Section 5 (2) of the Inter-State Water Disputes Act, 1956;

(ii) the said Order is, therefore, required to be published by the Central Government in the official Gazette under Section 6 of the Act in order to make it effective.

Question No.3. (i) A Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute when a reference for such relief is made by the Central Government;

(ii) whether the tribunal has power to grant interim relief when no reference is made by the Central

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A Government for such relief is a question which does not arise in the facts and circumstances under which the Reference is made. Hence we do not deem it necessary to answer the same.

N.P.V Reference answered.